Supreme Court of the United States.

OCTOBER TERM, 1917.

(25,411.)

ZOILO IBAÑEZ DE ALDECOA Y PALET AND JOAQUIN IBAÑEZ DE ALDECOA Y PALET,
Appellants,

v.

THE HONG KONG & SHANGHAI BANKING CORPORATION,
Appellee,

No. 230.

and

(25,412)

JOAQUIN IBAÑEZ DE ALDECOA Y PALET, ZOILO IBAÑEZ DE ALDECOA Y PALET AND ISABEL PALET Y CABARRO,
Appellants,

v.

THE HONG KONG & SHANGHAI BANKING CORPORATION,
Appellee.

No. 231.

BRIEF FOR APPELLEE.

PRESS OF GIBSON BROTHERS, INC., WASHINGTON, D. C.

TABLE OF CONTENTS AND INDEX.

TABLE OF CONTENTS.

Authorities.

Authorities.

Authorities.

Authorities.

INDEX.

Supreme Court of the United States.

OCTOBER TERM, 1917.

(25,411.)

ZOILO IBAÑEZ DE ALDECOA Y PALET AND JOAQUIN IBAÑEZ DE ALDECOA Y PALET,
Appellants,

v. — NO. 230.

THE HONG KONG & SHANGHAI BANKING CORPORATION,
Appellee,

and

(25,412)

JOAQUIN IBAÑEZ DE ALDECOA Y PALET, ZOILO IBAÑEZ DE ALDECOA Y PALET AND ISABEL PALET Y GABARRO,
Appellants,

v. — NO. 231.

THE HONG KONG & SHANGHAI BANKING CORPORATION,
Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

These actions have been consolidated by order of the Court on motion by appellee and will be briefed together.

Case No. 25,411 was commenced by a complaint by Zoilo Aldecoa and Joaquin Aldecoa against The Hong Kong

& Shanghai Banking Corporation, Aldecoa & Company in liquidation, and Isabel Palet y Gabarró for the cancellation of a certain deed of mortgage executed by the plaintiffs jointly with Aldecoa & Company, and Isabel Palet to secure the payment of an indebtedness of Aldecoa & Company to The Hong Kong & Shanghai Banking Corporation. The original complaint (Rec., p. 1, Case 25,411) was filed January 25, 1908. It was superseded by an amended complaint (Rec., p. 43, Case 25,411) filed November 17, 1908, which the defendant bank answered (Rec., p. 52, Case 25,411) after unsuccessfully demurring. The answer is a general denial. Answers were also filed (Rec. p. 49) by Isabel Palet and by Aldecoa & Company (Rec. p. 52).

The case was tried before the Hon. A. S. Crossfield, one of the judges of the Court of the First Instance of Manila. On March 28, 1910, the trial judge rendered his decision declaring the mortgage in question to be null and void as to Joaquin and Zoilo Aldecoa and decreeing the cancellation of its registration. The defendant bank moved for a new trial (Rec. p. 96, Case 25,411) on the ground of newly discovered evidence, which motion was granted by the Court by order dated April 27, 1910 (Rec., p. 106). After the rehearing the trial judge, on November 27, 1911, entered judgment (Rec., p. 112, Case 25,411) holding that the mortgage in question was valid as to the plaintiff Joaquin Aldecoa but void as to the plaintiff Zoilo Aldecoa. Motions for new trial were made unsuccessfully by Joaquin Aldecoa and by the defendant bank and the case was carried to the Supreme Court of the Philippine Islands by cross appeals (Bill of Exceptions, Rec. p. 120–154, incl.), which were argued and submitted January 14, 1914 (Rec. p. 156, Case 25,411).

During the pendency of the suit by Joaquin and Zoilo Aldecoa to obtain the cancellation of the mortgage as to

them, the obligation matured and on March 31, 1911, the Hong Kong & Shanghai Banking Corporation filed a complaint in the Court of the First Instance of Manila against all the mortgagors, including Joaquin and Zoilo Aldecoa, for the foreclosure of the mortgage (Rec. p. 1, Case 25,412). The defendants named were Aldecoa & Company, the principal debtor (in liquidation, and represented by William Urquhart, the liquidator appointed by the partners), and Isabel Palet, Joaquin and Zoilo Aldecoa, and Alejandro MacLeod. The original complaint was superseded by an amended complaint (Rec. p. 98, Case 25,412) to which amended answers were filed severally on behalf of Aldecoa & Company (Rec. p. 140) and Isabel Palet (Rec. p. 143) and jointly by the defendants Joaquin, Zoilo and Cecelia Aldecoa (Rec. p. 145). The defendant Alejandro MacLeod having died during the pendency of the suit the action was discontinued as to him (Rec. p. 150). Mr. William Urquhart, who was made a party defendant in his capacity as liquidator for Aldecoa & Company, filed a complaint in intervention (Rec. p. 79) claiming to be entitled to payment of certain moneys due him from Aldecoa & Company as a preferred credit, with precedence over the mortgage obligations in favor of the bank. The trial court found (Rec. p. 389, Case 25,412) that Mr. Urquhart had no legal interest in the matter in litigation between the parties plaintiff and defendant and dismissed his complaint of intervention. Mr. Urquhart appealed from the judgment but it was affirmed by the Appellate Court (Rec. p. 141–2, Case 25, 412). No appeal was taken from that decision.

The foreclosure suit was tried before the Hon. C. S. Lobingier, one of the judges of the Court of the First Instance of Manila, on January 22, 1912 (Rec. p.149). On August 10, 1912, Judge Lobingier rendered judgment in favor of the plaintiff bank and against the defendant

Aldecoa & Company in liquidation, for the sum of ₱344,924.23, together with interest thereon at the rate of 7 per cent per annum, to be compounded semi-annually, which sum the said defendant was ordered to pay into Court on or before the first day of the following term, in default of which it was decreed that the mortgage executed to plaintiff by the said defendant and by the defendants Isabel Palet, Joaquin Aldecoa and Zoilo Aldecoa be foreclosed by the sale of the mortgaged property to satisfy the said sum, interest and costs. It was further decreed that in the event that the proceeds of the sale should be insufficient to pay the amount found due the plaintiff, with interests and costs, the said sum should be paid by the said defendants Aldecoa & Company, Isabel Palet, Zoilo Aldecoa and Joaquin Aldecoa, jointly and severally, subject to the condition that execution should not issue against those defendants, except by way of foreclosure of the property specifically mortgaged by them, until the property of Aldecoa & Company should first be exhausted (Rec. p. 390, Case 25,412).

From this judgment the defendants appealed to the Supreme Court of the Philippine Islands.

On March 23, 1915, the Supreme Court of the Philippine Islands rendered decisions in both cases, namely, in the suit for the cancellation of the mortgage brought by Joaquin and Zoilo Aldecoa and in the suit brought by the bank for the foreclosure of the mortgage. In the first case (25,411, Rec. pp. 156, *et seq.*) it was held that the mortgage which Joaquin and Zoilo Aldecoa sought to have cancelled as to them was a valid and binding obligation as to each of said mortgagors. In the second case (Case 25,412) the Court sustained the judgment against Aldecoa & Company in liquidation, and the decree of foreclosure of the mortgage executed to the plaintiff bank by Isabel Palet, Joaquin Aldecoa and Zoilo Aldecoa. It also sus-

tained the judgment against Isabel Palet for any deficiency which might result after the sale of the mortgaged property but reversed the judgment with regard to the defendants Joaquin Aldecoa, Zoilo Aldecoa and Cecelia Aldecoa as regards their liability for such deficiency.

Aldecoa & Company acquiesced in the decision but Joaquin Aldecoa, Zoilo Aldecoa and Isabel Palet have appealed therefrom to this Court.

THE ISSUES MADE BY THE PLEADINGS.

Case 25,411.—In this case the substance of the averment of the plaintiffs Joaquin Aldecoa and Zoilo Aldecoa is (Rec. p. 18) that they were minors at the time they executed the mortgage in dispute and further that they were induced to execute it by misrepresentation and undue influence brought to bear upon them by the representative of the Hong Kong & Shanghai Banking Corporation. These contentions are met on the part of the bank (Rec. p. 25) by the averment that at the time of the execution of the mortgage in question the appellants Joaquin and Zoilo Aldecoa, who are Spanish subjects, had been lawfully emancipated by their mother, Isabel Palet, and were therefore competent to execute the mortgage in question and that the mortgage was in fact executed by them without any improper influence being brought to bear upon them, and with their full knowledge of the circumstances.

Case 25,412.—In this case the contention of the plaintiff bank was that the defendant Aldecoa & Company was liable as principal debtor; that the defendants Isabel Palet, Joaquin Aldecoa, Zoilo Aldecoa and Cecelia Aldecoa were liable as members of the defendant partnership; and that the defendants Isabel Palet, Joaquin Aldecoa and Zoilo Aldecoa were also liable as mortgagors (amended complaint, Rec. p. 98, Case 25,412). Aldecoa & Company not having appealed from the decision, it is not necessary to consider its contentions.

On behalf of Isabel Palet it was contended that she had been relieved from her liability under the mortgage by reason of the plaintiff's failure to sue Aldecoa & Company as each installment of the principal fell due; that this amounted to a novation of the contract, operating to release this defendant from her obligation as mortgagor (answer of Isabel Palet, Rec. p. 54, Case 25,412).

On behalf of Joaquin and Zoilo Aldecoa, it was contended

(*a*) That they were not partners in the firm of Aldecoa & Company and therefore not liable as such for its debts;

(*b*) That they were minors at the time they executed the mortgage for the plaintiff; that their emancipation by their mother Isabel Palet is void, and

(*c*) That the pendency of their suit to cancel the mortgage was a bar to the subsequent suit for foreclosure.

The Supreme Court upheld the contention of the defendants, Joaquin and Zoilo Aldecoa, as regards their liability as partners of Aldecoa & Company but held adversely to them with respect to the other issues.

In behalf of Cecelia Aldecoa it was contended that she was not liable as a member of the firm of Aldecoa & Company. This contention was upheld by the Supreme Court (Rec. p. 396) reversing the trial court. The bank did not appeal from this decision.

There is no dispute as to the facts, and the issues of law are sharply defined. They are

1. As to the appeals of Joaquin and Zoilo Aldecoa:

(*a*) Were they lawfully emancipated by their mother, Isabel Palet?

(*b*) Did they ratify the execution of the mortgage after attaining their majority?

(*c*) Was their plea of *lis pendens* well taken?

(*d*) Was the mortgage supported by a valid consideration?

2. As to the appeal of Isabel Palet:

(*a*) Is she liable as a partner for the debt of Aldecoa & Company to the bank?

(*b*) Has the mortgage on her property been discharged by novation of the contract without her consent?

STATEMENT OF FACTS.

I.

The appellant Isabel Palet is the widow of Zoilo Ibañez de Aldecoa y Palet, and the appellants Joaquin and Zoilo Aldecoa are their children who were born in the Philippine Islands March 27, 1884, and July 4, 1885, respectively. Zoilo Aldecoa, Sr., deceased, and his wife Isabel Palet, are natives of Spain. Zoilo Aldecoa, Sr., died in Manila, of which city he was a domiciled resident, October 4, 1895.

Stipulation, Rec. p. 155, Case 25,411.

II.

Zoilo Aldecoa, Sr., was at the time of his death the principal partner of the firm of Aldecoa & Company, engaged in business in the City of Manila. Upon his death his widow and the other surviving members of the firm organized another partnership for the purpose of carrying on the business in question. This partnership continued until December 31, 1896, when it was merged into another partnership under the firm name of Aldecoa & Company formed for the purpose of carrying on the business of the old concern. It appears from the articles of this partnership (Rec. pp. 183–197, inclusive, Case No. 25,412) that the appellants, Joaquin and Zoilo Aldecoa and their sister, Cecelia, were included as industrial partners. The appellant Isabel Palet y Gabarro was one of the capitalist partners.

III.

In 1897, Isabel Palet and her children, the appellants Joaquin and Zoilo Aldecoa, left the Philippine Islands and were absent from the Islands until 1903, when they returned.

Stipulation, Rec. p. 156, Case 25,412. Finding No. 5, decision Trial of the Court, Rec. p. 375, Case 25,412.

IV.

By public notarial instruments in evidence as plaintiff's Exhibits T (Rec. p. 203, Case No. 25,412) and U (Rec. p. 204, Case No. 25,412) executed in Manila July 31, 1903, the appellant Isabel Palet emancipated her sons, the appellants, Joaquin and Zoilo Aldecoa, each of whom was at that time over the age of 18 years; and the emancipation was expressly accepted by each of the said appellants, who, in token of their assent thereto, signed the acts of emancipation.

V.

The act of emancipation of the appellant Joaquin Aldecoa is in the following terms, to wit:

> In the City of Manila, Philippine Islands, this thirty-first day of July, nineteen hundred and three, before me, Enrique Barrera y Caldes, Notary Public of the same, personally appeared Doña Isabel Palet y Gabarro, widow of the Don Zoilo Ibañez de Aldecoa y Aguirre, property holder, of lawful age, and resident of this City, without exhibiting any cedula on account of being exempt therefrom by reason of her sex:
>
> And Don Joaquin Ibañez de Aldecoa y Palet, without any special profession, over eighteen years of age, and resident of the City, with cedula number one hundred sixty one thousand nine hundred and seventy eight, issued by the Collector of Internal Revenue of this City for the present year.

And having, as I believe they have, legal capacity to execute this instrument, Doña Isabel Palet y Gabarro states:

That acknowledging in her son, Don Joaquin Ibañez de Aldecoa, the faculty to rule his person and manage his property, renounces for herself the parental authority (patria protestad) which she heretofore had over his person and property, and by virtue hereof she empowers him from now on to manage by himself the property belonging to him and that which in the future he might acquire, just as if he was of lawful age in accordance with the laws, without depending from or the intervention of the exponent, executing all kinds of documents, either public or private, which may be necessary for the above named purposes.

Don Joaquin Ibañez de Aldecoa y Palet, on his turn states: That he accepts the emancipation granted him by his mother by virtue of the present document, being grateful to her for the benefit she thus confers on him.

In witness whereof, the above named parties ratify their statements before me, said parties being personally known to me, to be the persons above named, and swear that this is an act of their free will and deed, in the presence of the witnesses Don Candido del Rosario y Espiritu and Don Manual Sansano y Arciaga, both clerks, of lawful age and residents of this City, who sign with them this document which I authorize as Notary Public under my signature and the seal of my office, on the day, month and year above mentioned: to all of which I certify.

(Signed) ISABEL PALET, Widow of Aldecoa,
(Signed) JOAQUIN IBAÑEZ DE ALDECOA,
(Signed) CANDIDO DEL ROSARIO,
(Signed) MANUAL SANSANO.

(Signed) ENRIQUE BARRERA Y CALDES,
Notary Public.

(Notarial Seal.)
My commission expires January 1, 1905.

The act of emancipation of the appellant Zoilo Aldecoa is expressed in identical terms, with the exception of the difference in names.

VI.

At the time of the execution by the defendants Isabel Palet and Joaquin and Zoilo Aldecoa of the acts of emancipation above referred to, the law of the Kingdom of Spain regarding the emancipation of minors and the effects of such emancipation with respect to the latter and by which the nationality, status and capacity of Spanish subjects residing in foreign countries was to be governed was that contained in Articles 9, 18, 154 to 173, inclusive, and 314 to 319, inclusive, of the Civil Code of the Kingdom of Spain, which articles are the same as the articles under the same number of the Civil Code in force in the Philippine Islands on the 14th day of August, 1898.

Findings Trial Court, Par. VII, p. 376, Case 25,412.

VII.

After the execution by the appellant Isabel Palet and the appellants Joaquin Aldecoa and Zoilo Aldecoa of the acts of emancipation above mentioned (Exhibits T and U) the two defendants last named participated in the management of Aldecoa & Company as partners by being present and voting at meetings of the partners of the company upon matters connected with its affairs as appears from the minutes of such meetings in evidence as plaintiff's Exhibits X, Y and Z (Rec. pp. 208–209, inc., Case 25,412).

Findings Trial Court, Par. VIII, Rec. 376, Case 25,412.

VIII.

On the 23d day of February, 1906, Aldecoa & Company and the appellants, Isabel Palet, Joaquin Aldecoa and

Zoilo Aldecoa entered into an agreement with the plaintiff bank by which the latter granted to Aldecoa & Company a credit in account current up to the sum of ₱475,000 upon the terms and conditions set forth in the written instrument executed on that date by said parties, a copy of which is in evidence as plaintiff's Exhibit A (Rec. p. 150, Case 25,412; Rec. p. 4, Case 25,411).

Findings Trial Court, Par. IX, p. 376, Case 25,412.

IX.

On the 23d day of March, 1906, the appellee bank and the defendants Isabel Palet, Joaquin and Zoilo Aldecoa and Aldecoa & Company, executed an additional contract, supplemental to the contract of February 23, 1906, above referred to as Exhibit A, for the purpose of (*a*) increasing the security given the appellee bank for the performance of the obligations undertaken in its favor by Aldecoa & Co. pursuant to the terms of the contract of February 23, 1906 (Exhibit A), (*b*) correcting an error in the description of certain property mortgaged to the plaintiff bank by the said instrument of February 23, 1906, and (*c*) to determine the amount for which each of the mortgaged properties should be liable, all of which appears more particularly from the said supplemental contract of March 23, 1906, a copy of which is in evidence as plaintiff's Exhibit B (Rec. pp. 14–18, Case 25,412), admitted without objection by defendants (Rec. p. 150, Case 25,412).

Findings, Trial Court, Par. X, p. 377, Case 25,412.

X.

The mortgage created by the said contracts of February 23, 1906, Exhibit A, and March 23, 1906, Exhibit B, was duly recorded in the office of the Register of Deeds in Manila. The said mortgaged real estate was subsequently

brought under the operation of the Land Registration Act of the Philippine Commission by the mortgagors and in the year 1907 was registered as the property of the mortgagors in accordance with their respective interests therein, subject to the mortgage and in favor of the appellee bank.

Findings, Trial Court, Par. XI, XII and XIII, Decision, Trial Judge, Rec. p. 376–378, Case 25,412.

XI.

On December 31, 1906, Aldecoa & Company went into liquidation on account of the expiration of the term for which the firm had been organized and Mr. William Urquhart was by the partners duly elected liquidator.

Findings, Trial Court, Par. XV, Rec. p. 380, Case 25,412.

XII.

On the 13th day of June, 1907, by the request of Aldecoa & Company and of the appellants Isabel Palet, Joaquin Aldecoa and Zoilo Aldecoa, and to enable the said Aldecoa & Company to obtain an attachment upon the property of one Alejandro S. MacLeod in a suit then to be brought against the said MacLeod by Aldecoa & Company for the purpose of recovering from him certain shares of the Pasay Estates Company, Ltd., the appellee bank undertook and agreed to provide an attachment bond in the sum of ₱50,000, upon the condition and agreement that the proceeds of the suit against the said MacLeod after deducting the cost of the proceeding should be applied to the discharge *pro tanto* of the liability of Aldecoa & Company to the appellee bank; the instrument of mortgage of February 23, 1906, herein referred to as Exhibit A, was incorporated by reference into the said agreement of June 13, 1907. This contract of June 13, 1907 (identified as

Exhibit V), was signed by the appellant Joaquin Aldecoa, personally, by William Urquhart as liquidator of Aldecoa & Company and by José Maria Ibañez de Aldecoa, as attorney in fact for the appellants Isabel Palet and Zoilo Aldecoa.

Findings, Trial Court, Par. XVI, p. 380–381, Case 25,412.

XIII.

On December 31, 1906, on which date the defendant Aldecoa & Company went into liquidation, the amount of its indebtedness to the plaintiff bank upon the overdraft created by the terms of the contract of February 23, 1906 (Exhibit A), was ₱516,517.98.

Finding, Trial Court, Par. XXVII, Rec. p. 387, Case 25,412.

Neither the principal debtor of the Aldecoa & Company nor any of the other defendants in the foreclosure suit has paid or caused to be paid the plaintiff the yearly partial payments due under the contract in evidence as Exhibit A (Finding XXVIII, Trial Court, Rec. p. 388, Case 25,412); that from time to time between December 31, 1906, and August 10, 1912, on which date the judgment of the trial Court was rendered, the appellee bank has received various sums of money from or for the account of Aldecoa & Company; that the amount due the plaintiff bank upon the said indebtedness, evidenced by the contract identified as Exhibit A, was, with the interest then accumulated, ₱344,924.23 on August 10, 1912.

Finding No. XXXI, Trial Court, Rec. p. 388, Case 25,412.

The trial judge in his decision in Case No. 25,412—the foreclosure suit—made careful and complete findings upon all the facts in issue (Rec. pp. 303–319, incl.) and the

appellate court reached the same conclusions upon its review of the evidence (Rec. pp. 400–407, incl., Case 25,412; Rec. pp. 157–158, incl., Case 25,411) in each case. The findings of the trial and appellate courts are more extensive than our statement, as we have eliminated all matters pertaining wholly to the issues raised by those of the parties who have not appealed to this Court.

The Condition of the Record.—It is to be regretted that the appellants have seen fit to encumber the record with so much unnecessary repetition. The original pleadings have been printed, although superseded by the amended pleadings. The amended pleadings and the exhibits attached to them are printed for the third time (Rec. pp. 321–392) as part of the bill of exceptions and the decision of the trial court is printed twice. The result is that the printed records are much more formidable in appearance than they are in reality.

THE APPEAL OF ISABEL PALET.

The basis of the judgment against the appellant Isabel Palet.—With respect to this appellant the judgment of the trial court was that the mortgage given by her on her real property to secure the payment of the advances made to Aldecoa & Company by the appellee bank pursuant to the terms of the agreement embodied in the contract of February 26, 1906 (Exhibit A), should be foreclosed and that in the event of a deficiency she should pay it, subject to the proviso that execution should not issue against her until after the exhaustion of all the assets of Aldecoa & Company. (Decision of Trial Judge, Rec. p. 390, Case 25,412.) The Supreme Court of the Philippine Islands affirmed the judgment in the following terms:

> * * * It is hereby adjudged and decreed that the plaintiff corporation recover from defendant Aldecoa & Company, and from defendant Isabel

Palet y Gabarro jointly and severally the sum of ₱ 344,924.23, with interest thereon at the rate of 7 per cent per annum beginning from the 10th day of August, 1912, until complete payment thereof with the costs of both instances; that in case said appellant should not pay the sum which is allowed in this judgment within the term of 60 days * * * the plaintiff corporation may foreclose the mortgage executed by the defendants Aldecoa & Company, Isabel Palet y Gabarro, Joaquin Ibañez de Aldecoa and Zoilo Ibañez de Aldecoa on their real and personal property in favor of the plaintiff corporation. * * *

Rec. p. 414, Case 25,412.

BRIEF OF THE ARGUMENT AS TO THE APPEAL OF DOÑA ISABEL PALET.

1. Isabel Palet was a general partner of the firm of Aldecoa & Company.

2. Aldecoa & Company was a general mercantile partnership (sociedad mercantil regular colectiva) and all the members of the firm are liable *in solidium* with the partnership for all its debts.

3. The obligation imposed by the mortgage executed by the appellant Isabel Palet has not been discharged or modified in any way.

4. The forbearance of the Bank to sue Aldecoa & Company immediately upon the maturity of the respective installments of its indebtedness did not constitute an extension of the term.

POINT ONE.

ISABEL PALET Y GABARRO WAS A GENERAL PARTNER IN THE FIRM OF ALDECOA & CO.

The appellant Isabel Palet does not dispute the fact of her membership in the firm of Aldecoa & Company. She appears as one of the members of the firm in the articles of copartnership, as a capitalist partner (Rec. p. 183–197, Case 25,412).

POINT TWO.

ALDECOA & CO. WAS A GENERAL MERCANTILE PARTNERSHIP (SOCIEDAD REGULAR COLECIVA) AND ALL THE MEMBERS OF THE FIRM ARE LIABLE *IN SOLIDUM* WITH THE PARTNERSHIP FOR ALL ITS DEBTS.

It is stated in the articles of partnership of Aldecoa & Company that

> the partnership which is by these presents organized shall be a general mercantile partnership (sociedad mercantil regular colectiva) which is to do business under the name of Aldecoa & Co.
>
> Exhibit H, Par. I, Rec. p. 187, Case 25412.

The provisions of law under which this partnership was organized are to be found in Articles 125 to 144, incl., of the Code of Commerce of the Philippine Islands. Article 127 of that Code provides that

> all the members forming a general partnership, whether or not they are managers thereof, shall be liable personally and *in solidum* with all their property for the operations carried on in the name and for account of the company under the firm name by any person authorized to sign the name.

The solidary obligation of each and every one of the general partners of the general mercantile partnership under the Commercial Code is clearly determined by the statute and has been constantly enforced by the Philippine Courts.

Under the law in force in the Philippine Islands the personal liability of each of the general partners for the debts of a mercantile partnership, *in solidum* with the entity itself is inherent in the very nature of the association, and an agreement by which it is sought to relieve one of the partners of this liability is void as to third persons.

Sunico *v.* Chuidian, 9 Phil. Reps. 631.

But the individual partners may be joined as defendants with the partnership, although the private property of the partners so joined may not be subjected to the payment of the judgment until the common property of the firm is exhausted. The liability of the partner for the debts of the partnership, while solidary, is subsidiary.

Compania Maritima *v.* Muñoz, 9 Phil. Reps. 326.

These doctrines are the logical result of the recognition of partnerships, under the Philippine law, as *entities*. In the early case of Wahl *v.* Donaldson Sim & Company, in disposing of the contention that the action should abate because of the death of Mr. Donaldson Sim, one of the two partners, the late Mr. Justice Willard, writing the opinion of the Court, said:

> We hold that the record shows that the defendant in this case was a collective partnership, organized under the provisions of the Code of Commerce, and was therefore a jurdicial person, under Article 116 of the Code of Commerce, and under Article 35 of the Civil Code. According to the latter Article it had a personality distinct from that of each one of the partners. * * *

Wahl *v.* Donaldson Sim & Co., 5 Phil. Reps. 14.

The appellant Isabel Palet did not dispute in the lower courts her liability as a partner for the payment of the debt of Aldecoa & Company to the appellee bank. In her appeal to the Supreme Court of the Philippine Islands from the decision of the Court of First Instance of Manila she assigned only two errors, neither of which put in issue the correctness of the judgment of the trial court with regard to the amount of indebtedness of Aldecoa & Company or the liability of this appellant for its payment. (Decision, Supreme Court of Phillippine Islands, Rec. p. 407, Case 25,412.) On the contrary, the second assignment expressly recognized that liability, the contention there made being that the Supreme Court erred in refusing to order that

> the property of Aldecoa & Company should be exhausted before the plaintiff firm should be entitled to have recourse to the property of this defendant and appellant for the satisfaction of its judgment.

In its decision, the Supreme Court of the Philippine Islands said regarding the appellant Isabel Palet:

> This appellant does not contend that she is not personally liable *in solidum* with Aldecoa Company for the liabilities of the latter firm to the plaintiffs in the event that the appeal taken by Aldecoa & Company should be unsuccessful.

The lower court held that the judgment against Aldecoa & Company should be affirmed. No appeal has been taken from this decision and it is now final.

The seventh paragraph of the assignment of errors upon which this appeal has been taken (Rec. p. 431, Case 25,412) again recognizes by necessary inference the liability of the appellant Isabel Palet for the payment of the judgment against Aldecoa & Company, the only question there presented being the order in which the plaintiff

should have recourse to the assets of the judgment debtors.

The Supreme Court of the Philippine Islands said:

> The trial judge directed that the mortgaged property, including the property mortgaged by this defendant, should be sold under foreclosure in the event that Aldecoa & Company should fail to pay into court the amount of the judgment within the time designated by that order. The court recognized the subsidiary character of the personal liability of Doña Isabel Palet as a member of the firm of Aldecoa & Company and decreed that as to any deficiency that might result after the sale of the mortgaged premises execution should not issue against the property of Doña Isabel Palet until the property of Aldecoa & Company should have been exhausted.
>
> Rec. p. 407, Case 25,412.

It is true that the judgment (Rec. p. 414) entered by the Clerk (Rule 66, Supreme Court of the Philippine Islands, Appendix, Vol. VII, Philippine Reports) runs against Aldecoa & Company and Isabel Palet, jointly and severally, and does not in terms express the subsidiary character of the liability of this defendant. This is no doubt due to a mere clerical error in the entry of the judgment and the appellant bank does not oppose such modification as may be necessary to the end that the judgment against this appellant be brought into harmony with the expressed opinion of the lower court, namely, that save as regards the foreclosure of the mortgage no execution shall issue against Isabel Palet until after the exhaustion of the assets of the principal debtor—which, by the way, is a mere formality as there are no such assets available, Aldecoa & Company being notoriously insolvent, as stated by the Supreme Court in its decision. (Rec. p. 405, Case 25,412.)

The statement of the Philippine Supreme Court regarding the insolvency of the firm of Aldecoa & Company is made the subject of the second assignment of error in

Case 25,412 (Rec. p. 430). While the correctness of this finding is by no means essential to the correctness of this judgment we may say in passing that the existence of these appeals furnishes abundant proof of its truth, for it is obvious that if Aldecoa & Company, the principal debtor, as to whom the judgment below is final, were possessed of the means to discharge its liability, and thereby of necessity relieve the persons subsidiarily responsible for its payment, this appeal would not have been taken.

POINT THREE.

THE OBLIGATION IMPOSED BY THE MORTGAGE EXECUTED BY THE APPELLANT ISABEL PALET HAS NOT BEEN DISCHARGED OR MODIFIED IN ANY WAY.

The appellant Isabel Palet in support of her appeal from the decision of the Court of First Instance of Manila made but two assignments of error. The second assignment, which we have already considered, related solely to the alleged error of the trial court in failing to direct that the property of Aldecoa & Company be first exhausted before execution might issue against the property of this appellant. By the other assignment of error it was contended that the trial court erred in failing to hold that the obligation of this appellant as surety had been extinguished in accordance with the provisions of Article 1851 of the Civil Code (Decision, Philippine Supreme Court, p. 407, Case 25,412).

In passing upon this assignment of error the lower court said:

> It is urged on behalf of Isabel Palet that the mortgages executed by her upon her individual property have been cancelled. The ground for this contention is that Aldecoa & Company undertook by the contract of February 23, 1906, to discharge its liability to the

plaintiff bank at the rate of not less than ₱50,000 per annum, and that therefore it was the duty of the bank to sue Aldecoa & Company as soon as that firm failed to pay at maturity any one of the partial payments which it had promised to make, and to apply the proceeds from the sale of the property of Aldecoa & Company to the satisfaction of this indebtedness, and that the fact that the bank failed to do so is equivalent to an extension of the term of the principal debtor, and that the effect of this extension has been to extinguish the obligation of this defendant as a surety of Aldecoa & Company. It is also contended that the bank expressly extended the term within which Aldecoa & Company was to satisfy its obligation by allowing Aldecoa & Company to furnish additional security. Doña Isabel Palet alleges that all these acts were done without her knowledge or consent.

The extension of the term which, in accordance with the provisions of article 1851 of the Civil Code produces the extinction of the liability of the surety must of necessity be based on some new agreement between the creditor and principal debtor, by virtue of which the creditor deprives himself of his right to immediately bring an action for the enforcement of his claim. The mere failure to bring an action upon a credit, as soon as the same or any part of it matures, does not constitute an extension of the term of the obligation.

Doña Isabel Palet is a personal debtor, jointly and severally, with Aldecoa & Company, of the whole indebtedness of the latter firm to the bank, and not a mere surety for the performance of the obligations of Aldecoa & Company without any solidary liability. It is true that certain additional deeds of mortgage and pledge were executed by Aldecoa & Company in favor of the bank as additional security after Aldecoa & Company had failed to meet its obligation to pay the first instalment due under the agreement of February 23, 1906, but there is no stipulation whatever in any of these documents or deeds which would bind the

bank to wait for the expiration of any new term before suing upon its claim against Aldecoa & Company. We find nothing in the record showing either directly or indirectly that the bank at any time has granted an extension in favor of Aldecoa & Company for the performance of its obligations. The liquidator of Aldecoa & Company authorized the bank to grant certain extensions to some of the provincial debtors of Aldecoa & Company whose debts were to be paid to the bank under the authority conferred upon the bank by Aldecoa & Company. There is a marked difference between the extension of time within which Aldecoa & Company's debtors might pay their respective debts, and the extension of time for the payment of Aldecoa & Company's own obligation to the bank. If the bank had brought suit on its credit against Aldecoa & Company for the amount then due on the day following the extension of the time of Aldecoa & Company's debtors for the payment of their debts, it is evident that the fact of such extension having been granted could not have served in any sense as a defense in favor of Aldecoa & Company against the bank's action although this extension would have been available to Aldecoa & Company's debtors if suit had been brought to enforce their liabilities to Aldecoa & Company. We must, therefore, conclude that the judgment appealed from, in so far as it relates to Doña Isabel Palet, must likewise be affirmed. (Rec. p. 408, Case 25,412.)

It is submitted that the court below committed no error in thus disposing of the contentions of this appellant.

There is no pretention that the original obligation incurred by the appellant Isabel Palet was not valid and binding nor could there be in the light of the terms of the contract. The evidence shows that early in 1906 Aldecoa & Company were heavily indebted to the plaintiff bank; that time was desired for the purpose of meeting the obligation so as to avoid the necessity of sacrificing assets by a forced sale. The manager of the bank insisted that un-

less additional security were furnished by the individual partners proceedings would be taken at once to enforce payment. Aldecoa & Company had been in the debt of the appellee bank in large amounts since 1901 (Testimony of defendant's witness Urquhart, Rec. p. 169, Case 25,412). The correspondence between the Manila manager of the appellee bank and the managers of Aldecoa & Company is set forth in full in the record of Case 25,411 on pages 81–92, incl. It is apparent from this correspondence and particularly from the letter addressed by the manager of Aldecoa & Company to Mrs. Isabel Palet under date of October 18, 1905 (Exhibit J, Rec. p. 83, Case 25,411), that Aldecoa & Company was at that time indebted to the bank in a sum in excess of ₱400,000 then due and demandable and that the bank had given formal notice that the obligation must be discharged before the end of the year or satisfactory security given. It was with full knowledge of this condition of affairs and in order to obtain for herself and the other members of the firm an additional advance and the benefits of an extension of time within which to discharge this obligation that Mrs. Isabel Palet executed the mortgage to the bank (Exhibit A, Rec. p. 7, Case 25,412). By the terms of that agreement Aldecoa & Company was allowed five years within which to discharge its obligation to the bank (Rec. p. 11, Case 25,412), the understanding being that the overdraft was to be reduced at the rate of ₱50,000 a year during that period and discharged in full at the end of that time, the debt to draw interest at 7 per cent per annum compounded annually (Exhibit A, Par. IX, Rec. p. 12, Case 25,412).

The obligation of Aldecoa & Company to discharge its indebtedness to the bank upon the agreed terms was guaranteed by Mrs. Isabel Palet and her sons, their obligation being in terms secured by the mortgage of the property described in the agreement (Exhibit A, Par. X,

XI, XII, Rec. pp. 12–13. Case 25,412). In Paragraph XIII it was stipulated for the benefit of the mortgagors that the bank should not be entitled to foreclose its mortgage upon the property of the appellants in any event until the expiration of the full term of the five years allowed Aldecoa & Company for the discharge of its debt.

Aldecoa & Company went into liquidation on December 31, 1906, and William Urquhart was elected liquidator by resolution of the members of the firm adopted at a meeting held in Manila January 24, 1907 (Exhibit J, Rec. p. 198, Case 25,412), at which Mrs. Isabel Palet was represented by her attorney in fact, Don Fernando Zobel. By the terms of that resolution it was declared to be the opinion of the members of the firm that it was to the interest of all concerned that

> the liquidation be carried on as slowly as possible inasmuch as in that manner there will be great probability to succeed in getting all the debtors of the firm to pay in full the amount of their debts and to sell certain parts of the business as a going concern,

and the liquidator was authorized to endeavor to obtain the cooperation of The Hong Kong & Shanghai Banking Corporation in winding up the business of the firm in accordance with the terms of this resolution.

A large part of the assets of Aldecoa & Company consisted of credits against provincial concerns with which it had been doing business. Several of these credits were assigned to the bank by way of additional security (Exhibit E, Rec. p. 28; Exhibit F, Rec. P. 35; Exhibit G, Rec. p. 42, Case 25,412), with authority to make collections and to apply the proceeds to the discharge of the indebtedness of Aldecoa & Company. The bank consented to give these provincial debtors of Aldecoa & Company an opportunity to discharge their obligations in installments and this agreement was carried out. On

cross examination the defendant's witness Urquhart testified as follows on this subject:

> About the 20th of January the Hong Kong Bank came to an arrangement to make the liquidation slow, and give time to people to pay. (Rec. p. 179, Case 25,412.)

It appears conclusively from the testimony of Mr. Urquhart that in no instance did the bank grant any extensions of time to any of Aldecoa & Company's debtors for the payment of their obligations without obtaining the consent of Mr. Urquhart as liquidator (Rec. pp. 170–1, Case 25,412), and that the bank did nothing in this regard except to acquiesce in the desire of the partners of Aldecoa & Company, including Mrs. Isabel Palet, that the liquidation should be carried out slowly. There is not a word of evidence in the record to show that the bank at any time granted any extensions of time within which the debt of Aldecoa & Company should be paid. It is too clear for argument that the lower court is correct in its conclusion that the consent of the bank to an extension of time by Aldecoa & Company for the payment by the debtors of that firm of their debts could in no sense be construed as an extension of the term for the payment of the debt of Aldecoa & Company to the bank.

Decision, Phil. Sup. Ct., Rec. p. 409, Case 25,412.

POINT FOUR.

THE FORBEARANCE OF THE BANK TO SUE ALDECOA & CO. IMMEDIATELY UPON THE MATURITY OF THE VARIOUS INSTALLMENTS OF ITS INDEBTEDNESS DID NOT CONSTITUTE AN EXTENSION OF THE TERM.

It is, of course, obvious that the bank, had it seen fit to do so, might have disregarded the request of Mrs. Isabel Palet and her associates that the liquidation be carried on slowly and might have sued Mrs. Palet and her associates at once as each installment fell due, although it could not have proceeded to foreclose the mortgage until after the expiration of the stipulated period of five years. The failure to do so, however, does not constitute any such extension as would have discharged Mrs. Isabel Palet had she been merely a surety, instead of one of the principal debtors.

This contention was made in the early case of Banco Español Filipino *v.* Donaldson-Sim & Co., 5 Philippine Rep. 418. In that case the bank sued the sureties, who had obligated themselves *in solidum* with the principal debtors. The defense was made that the sureties had been discharged by the failure of the bank to bring suit immediately upon the maturity of the obligation. The Court disposes of the contention adversely to its proponents, saying:

> Deferring the filing of the action does not imply a change in the efficacy of the contract or liability of any kind on the part of the debtor. It is merely, without demonstration of proof to the contrary, respite, waiting, courtesy, leniency, passivity, inaction. It does not constitute novation, because this must be express.
>
> Banco Español Filipino *v.* Donaldson-Sim & Co., 5 Phil. Reps. at p. 423.

The underlying principle of the Donaldson-Sims case is that whenever, under our Philippine Civil Code, a surety obligates himself *in solidum* with the principal debtor, such surety, so far as the creditor is concerned, is himself a principal debtor and may be sued alone. Art. 1822 of the Civil Code provides that

> If the surety binds himself *in solidum* with the principal debtor the provisions of Section 4 of Chapter 3 of Title One of this Book shall be observed.

The reference is to that part of the Civil Code which deals with the subject of solidary obligations.

In this case, Mrs. Isabel Palet owes the bank, *in solidum* with Aldecoa & Company, the whole debt of the latter. The solidary nature of her obligation is not affected by the fact that it is subsidiary—that she is entitled to have partnership assets exhausted before the creditor has recourse to her individual assets.

Civil Code, Art. 1140.

The only effect of the mortgage, therefore, was to subject specific property to the obligation resulting from the existing partnership and to render it liable to judicial sale in satisfaction of the *primary* obligation of Aldecoa & Company as an entity, instead of the *subsidiary* solidary liability of Mrs. Palet as a general partner.

Even had Mrs. Palet been a mere surety, instead of a solidary principal debtor, the principle that mere forbearance to sue the principal debtor, without a binding agreement for an extension, does not discharge the surety is as thoroughly established in our own law as it is in the law of Spain and of the Philippine Islands.

Bank of Union *v.* Mackey, 140 U. S. 220.
Cross *v.* Allen, 141 U. S. 528.
U. S. *v.* Nazandt, 11 Wheaton 184.

It is respectfully submitted that damages in addition to interest should be awarded plaintiff against this defendant pursuant to the provisions of Par. II of the 23d rule of this Court.

THE APPEAL OF JOAQUIN AND ZOILO IBAÑEZ DE ALDECOA.

The liability which appellee seeks to enforce against these appellants rests solely upon the execution by them of the mortgage upon their real estate given to secure the indebtedness of Aldecoa & Company to plaintiff bank (Exhibit A, Rec. p. 7, Case 25,412). It was contended in the court below that these defendants were also liable as partners of Aldecoa & Company, but this contention was decided adversely to the Bank and no appeal was taken from the ruling, the practical effect of the decision with regard to the validity of the mortgage being identical. The defendants were under the age of twenty-three years when they signed the mortgage, but had been emancipated by the appellant, their mother, who was then a widow. They seek to repudiate the obligation upon the theory that their emancipation was invalid and they were therefore minors, incapable of contracting, when they signed the mortgage. They also contend (Assignment of errors, No. XI, Rec. p. 431, Case 25,412) that their plea of another suit pending should have been sustained, and that the mortgage was without consideration as to them.

BRIEF OF THE ARGUMENT AS TO THE APPELLANTS JOAQUIN AND ZOILO ALDECOA.

The grounds upon which we contend that the judgment against these appellants should be affirmed are as follows:

1. The emancipation of these appellants and the subsequent execution by them of the disputed mortgage were valid under the laws of the Philippine Islands.

2. The defendants Joaquin and Zoilo Aldecoa and their mother, Isabel Palet, are subjects of the Kingdom of Spain.

3. Their emancipation by their mother, Mrs. Isabel Palet, was valid under their national law.

4. Foreigners capable of contracting by the terms of their national law are bound by their contracts made in the Philippine Islands.

5. The mortgage has been ratified by the defendant Joaquin Aldecoa after he attained his full majority.

6. The mortgage was executed by these defendants voluntarily and their consent was not obtained by improper conduct on the part of the appellee.

7. The mortgage by these defendants is supported by a valid consideration.

8. The plea of another suit pending was properly rejected.

POINT ONE.

THE EMANCIPATION OF THE APPELLANTS, JOAQUIN AND ZOILO IBAÑEZ DE ALDECOA, AND THE SUBSEQUENT EXECUTION BY THEM OF THE DISPUTED MORTGAGE, WERE VALID UNDER THE LAWS OF THE PHILIPPINE ISLANDS.

(*a*) THE ISSUE AS TO THE VALIDITY OF THE EMANCIPATION.

In their amended complaint in the action for the cancellation of the mortgage (Rec. p. 44, Case 25,411), the appellants, Joaquin and Zoilo Ibañez de Aldecoa, allege (page 2) that in attempting to emancipate her sons and in conferring upon them authority to dispose of their property, their mother, Doña Isabel Palet, acted

> in violation of the laws in force in the Philippine Islands,

and that at the time when the acts of emancipation were executed their mother had no authority whatever over them.

The issue in this case, as stated by the court below (Rec. p. 159, Case 25,411) was

> whether Doña Isabel Palet could legally emancipate the plaintiffs under the law in force in this country in July, 1903, and thus confer upon them capacity to execute a valid mortgage upon their real property with her consent.

The same issue was made by the answer of these appellants to the complaint of the Hong Kong Bank in the fore-

---

NOTE.—The attention of the Court is respectfully drawn to a misprint on page 147 of the Record of Case 25,412 whereby it is made to appear that the appellant Joaquin was only twelve years of age when he executed the mortgage in dispute. The figures have been inverted —the appellant at that time being twenty-one years of age as shown by the stipulation of facts appearing on page 155 of the Record, Case 25,411.

closure suit (Amended answer of Joaquin and Zoilo Ibañez de Aldecoa, Rec. p. 147, Case 25,412).

The specific contentions upon which the defense is based are:

1. That those provisions of the Civil Code authorizing emancipation of minors have been repealed by implication by Sections 551, 552 and 553 of the Code of Civil Procedure enacted by the Philippine Commission in 1901 (Act 190).

2. That this law was applicable to appellants in 1903, when the acts of emancipation were executed.

We contend on the contrary, not only that the provisions of the Civil Code continue to govern in cases in which the *patria potestas* was being exercised when the new Code took effect, as held by the lower court, but that there has been no repeal by implication or otherwise of those provisions of the Civil Code relating to the *patria potestas*, and that with a single exception of minor importance, the law on the subject of the *patria potestas*, as established by the Civil Code, remains in force in its entirety.

The provisions of the law relating to the *patria potestas* are to be found in Title 7, Book 1 of the Civil Code (Articles 154 to 180).

The gist of the contention of the appellants was that inasmuch as the cited sections of the Code of Civil Procedure establish the rules that children whose parents are living are subject to guardianship and that parents are no longer entitled as of right to the administration of the property of their children there is such a conflict between these provisions of the Code of Civil Procedure and the articles of the Civil Code relating to the *patria potestas* that the statutes relating to this institution, including that by which emancipation was authorized, have been repealed by implication; that the acts of emancipation having been

executed subsequently to the enactment of the Code of Civil Procedure were therefore void.

The Supreme Court of the Philippine Islands held that the guardianship provisions of the Code of Civil Procedure now in force in the Philippines have repealed by implication that part of the Civil Code by which parents enjoying the *patria potestas* over their minor children were entitled to the administration and usufruct of the property of such children; but that this repeal of the Civil Code was not operative with respect to parents who were in theexercise of the *patria potestas* under the Civil Code at the time of the enactment of the new law; that as to such parents, their rights and duties with respect to their children, including the right of emancipation, continued to be regulated by the Civil Code.

(*b*) THE ENACTMENT OF THE CODE OF CIVIL PROCEDURE DID NOT AFFECT EXISTING RELATIONS BETWEEN PARENT AND CHILD.

Upon this branch of the subject the court below said:

> Having determined that the present Code of Civil Procedure has repealed the *patria potestas* with reference to the child's estate and the power of emancipation by concession of the parent, the question remains: Does the new order of things apply to a parent who assumed charge of the property of her minor children in 1895? If it does, then the execution of the mortgage which the appellant children now seek to have annulled was an act properly devolving upon a guardian appointed by the court, who must have asked for and received the Court's approval to enter into the said contract before it could bind the property of the children. On the other hand, if the new law does not affect estates of minor children whose parents assumed charge thereof prior to the enactment of the new code, the validity of the mortgage must be determined by the provisions of the Civil Code. To state the proposition in another

form: Were all parents administering the property of their minor children by virtue of the provisions of the Civil Code on October 1, 1901 (the date the new law of guardianship became operative), *ipso facto* deprived of their control over the estates of their minor children? Did it immediately become necessary to bring these estates under the operation of the new law?

Under cover of procedure a radical departure from the substantive law had been made. The Civil Code provided a method of conserving the estates of minor children through the agency of their parents, without the necessity of judicial intervention (except in a very limited sense). It had, furthermore, endowed the minor child after emancipation by concession of the parent with the capacity to freely contract with third persons, requiring only the parent's approval of contracts in alienation of or encumbering the child's real property and for the borrowing of money. And lastly, it gave to third persons entering into contracts with emancipated children assurance that such contracts were binding and valid upon the children. The new law of guardianship practically placed the parent in the position of a stranger to the child's estate, giving him only a preferential right, other things being equal, to an appointment as guarddian of the estate. It brought the child's estate under the control of the court. And finally, the incapacity of the children between the age of 18 and the age of majority to contract with third persons could not be modified in the least by mutual consent of the parent and child, and, hence, contracts made in that manner were no longer binding upon the child. The change was abrupt, it was entire, and, unfortunately, it was not specified but implied. Whether the change was casual or intended, it is unnecessary to determine. That it occurred is the unavoidable conclusion. Under these circumstances the inquiry naturally arises, Does the new law contain any saving provision excepting from its operation those estates of minor children which were being administered either

by the parents under the *patria potestad* or by the children themselves under the provisions of the Civil Code relating to emancipation by concession of the parent? That the authors of the new code recognized a conflict between the new law of guardianship and the existing system of caring for the estates of incompetents is evident from an examination of section 581 thereof. That section reads:

"*Pending guardianships to proceed in accordance with Spanish law, with certain exceptions.*—All proceedings in cases of guardianship pending in the Philippine Islands at the time of the passage of this Act shall proceed in accordance with the existing Spanish procedure under which guardians were appointed: *Provided, nevertheless*, That any guardian appointed under existing Spanish law may be removed in accordance with the provisions of section five hundred and seventy-four of this Act, and his successor may be appointed as therein provided, and every successor to a guardian so removed shall, in the administration of the person or estate, or either, as the case may be, of his ward, be governed by the provisions of this Act."

This section saves from the operation of the new act all proceedings in cases of guardianship pending in the Philippines Islands at the time of its passage. Does this refer to and include the administration of the property of minor children by their parents under the provisions of the Civil Code? If it does then the authority which Isabel Palet exercised over the property of her minor children was not affected by the enactment of the new code of procedure, and she was at liberty to proceed as she did, in accordance with the provisions of the Civil Code, to emancipate her children by a formal declaration, and they thereupon acquired the capacity extended to emancipated children by Article 317 of that code.

Examining the section with a view to ascertaining the mere literal meaning of the language used, we are at once met with the argument that it refers only to cases of guardianship and that the parent admin-

istering the estate of his minor child in accordance with the Civil Code is not a guardian, either under the Civil Code or as that word is used in the Code of Civil Procedure. Hence, according to this argument, the *patria potestad* and the ancillary right of emancipation pertaining to the parent are not saved from the operation of the new law by section 581. But we are of the opinion that the argument amounts to a play upon words rather than to a reasonable interpretation of the section. In the first place, the question arises, In what sense were the words, "guardian" and its derivative, "guardianship," used in section 581? Were they used in the same sense as in the preceding sections of Chapter 27 of the new act, the chapter prescribing the new law of guardianship? If so, they include the administration of the estates of all incompetents, including infants whose parents are living, for that is the design of the new law of guardianship. If the argument under examination is sound, it must be held that the authors of the code descended from this all-inclusive meaning of the word when they finally came to the consideration of what ought to be saved, and attempted to deal only with guardianship as that term is understood in the civil law. A careful examination of the entire act, in the light of the conditions under which it was passed, reveals convincing evidence that the authors of the code attempted no such nicety of expression in section 581. With the advent of American sovereignty in 1898 there came an influx of American ideas of administration of justice. A new code of criminal procedure was enacted under authority of the military governor in 1900, and early in 1901 the first Philippine commission undertook as one of its first tasks the reorganization of the courts and the enactment of a new code of civil procedure. The new legislation did not purport to be an amendment of the Spanish law on the subject. On the contrary, it was a virtual substitution of the one for the other. The various sections of the Code of Civil Procedure

were, practically speaking, adopted without material alteration from one or another of the States of the American Union. Both executive and legislative affairs were, at the time, being discharged by a single body—the Philippine Commission—and the pressure of business afforded little opportunity or time to carefully survey the field covered by the new legislation and discover how much of the former law would be affected by the new act. The only method that could be safely followed, under the circumstances, was to ruthlessly brush aside the Spanish law and inaugurate the new in the form which had withstood the test of time in the United States, and leave the extent of the change to be ascertained by the courts in the actual administration of the new code by determining implied repeals. Hence, the authors of the new code expressed themselves entirely in terms of American law. Instances pointing to this fact are numerous. Thus, "embezzlement" in section 30; "adverse possession" in section 41; "battery" and "slander" in section 43; "corporation" in section 198 and various other sections; many of the terms used in the chapter on evidence; "residuary legatee" in section 644; "heir" as it is used in various sections of the probate procedure; all show quite clearly the extent to which the authors of the new code held to the technical terms of American law in compiling the new code. Bearing in mind such extreme instances of the terms in which the authors of the new code expressed themselves, is it possible that they stopped to make a distinction in section 581 between the administration of a minor's estate by his parent and the administration of the estates of all other incompetents? They knew that the system they were introducing was applicable to the estates of all incompetents. The fact that they inaugurated this new system of caring for the estates of incompetents clearly shows that they disapproved, without distinction, all of the existing law on that subject. The administration of the estate of a minor by his parent was impliedly re-

pealed by the new law. Is it not reasonable to suppose that the saving clause, which it was deemed desirable to insert in the new law, was intended, by implication, to include those pending cases of that nature? A saving clause is enacted to save something which would otherwise be lost. When existing procedure is altered or substituted by another, it is usual to save those proceedings pending under the old law at the time the new law takes effect. This was the purpose of section 581. It was designed to save undisturbed all pending proceedings in guardianship cases; that is, those proceedings already begun and still unfinished, which would otherwise have been affected by the new law, were to be allowed to continue to determination in accordance with the old law. There was no reason for allowing guardianship so called under the Civil Code, pending at the time the new code went into effect, to continue undisturbed by the new law, while parents who were administering the property of their minor children under the same code must submit to the new regulations. Both were equally favored institutions under the civil law, and both were equally disapproved by the authors of the new code.

But it is said that those pending cases wherein the parents were administering the property of their minor children do not come within the saving provisions of section 581 because that section refers only to pending cases of guardianship wherein the guardians were appointed in accordance with the Spanish procedure; that is, guardians who were subject to removal by the court in accordance with the provisions of section 524 of the new code, and whose successors could be appointed as therein provided.

Guardianship, so called under the Civil Code, was conferred (*a*) by will; (*b*) by law; and (*c*) by the family council. Guardians thus designated were removable generally by the family council. The right to administer the property of an infant child was conferred upon the parent by law. Under article 169 of the Civil Code the parent lost the authority over his minor

child (*1*) by a final judgment in a criminal case; and (*2*) by a final judgment in a case for divorce. And under article 171 the courts had the power to deprive parents of the parental authority or suspend the exercise thereof when they treated their children with excessive cruelty, or if they gave them corrupting orders, advice, or examples. The courts could also deprive the parents either totally or partially of the usufruct of the child's property.

All pending cases of testamentary guardianship, legitimate guardianships, and guardianships conferred by family councils fall within the provisions of section 581. The guardians in these cases may be removed by the Court in accordance with the provisions of section 574, and their successors appointed as therein provided. What sound reason can be advanced for excluding those pending cases wherein the person and property of the minor child were being cared for by the parent under the *patria potestad?* The *patria potestad* was conferred by law. In each instance the law specifically designated in their order the persons who were entitled to the care and custody of the child and the administration of its property. In those particulars both are the same. But how may a court, under the authority conferred upon it by section 581, remove a parent who is exercising the *patria potestad* over the person and property of his minor child and appoint a guardian in accordance with the provisions of section 574 of the person and property of such child?

The question might be answered by pointing out that if the probate court was duly informed that a parent had lost the authority over his minor child, or had lost the parental authority over both the child and its property as provided in articles 169 and 171 of the Civil Code, it could proceed to appoint a regular guardian for both the person and property of the child. It may be true that the probate court would not have the power to deprive a parent who was exercising the *patria potestad* over the person and property of his minor child of either the possession

of the child or its property, and appoint a guardian to take charge of either or both. This, if true, is not, in our opinion, a sufficient reason for excluding from the operation of section 581 those cases pending wherein the affairs of minor children were being administered by their parents in accordance with the former law.

In the final analysis, it seems that protection from the effects of the new law is claimed for the Civil Code guardian because he was exercising his duties *eo nomine*, while the parent and parties dealing with that parent are to be denied that protection because the parent acted under the *patria potestad* or under those provisions of the code relating to emancipation, the child by concession of the parent.

The first premise of the plaintiff's case rests upon the proposition that the parent's right to administer the property of his child has been abolished by the new law of guardianship. This conclusion is reached by determining that this right and the present law of guardianship cover the same subject, that they are repugnant to each other, that they cannot stand together, and that, therefore, the latter case repeals the former. The second premise of the plaintiff's case is that pending cases of *patria potestad* are not within the saving clause of section 581. This conclusion is reached by disregarding the substance of the two methods of caring for the minor children and their property, and clinging to the word forms "*patria potestad*" and "guardianship." In the first premise the intent of the law is the determining factor. In the second premise the intent is disregarded.

But it is asked why the plaintiffs were not given the same status when they are emancipated in 1903 as any other incompetents whose Civil Code guardians had died, resigned, or been removed, inasmuch as the plaintiffs and their mother occupied the same position for the purpose of bringing them within the saving provision of section 581 as a Civil Code guardian and his wards. We have attempted to show that the emancipation of the plaintiffs was not

an interruption of the dependency of the child upon the parent, that the parent did not thereby divest herself of control over the child's property. Hence, there could not follow any such hiatus in the protection afforded the child as occurs by resignation or removal of a guardian so called under the Civil Code. The difference between the status of the two groups of children is clear and fundamental.

We therefore conclude that it was intended by the saving provision of section 581 to withhold the application of the new law from all those cases which were already being taken care of under the provisions of the Civil Code, and that the plaintiffs had full power to charge their estate with the mortgage which they now seek to disaffirm.

Decision Philippine Supreme Court. Record pp. 165 to 170, inc. Case 25,411.

While we do not agree with the conclusion of the Court to the effect that the enactment of the Code of Civil Procedure has had the effect of depriving parents of the right of emancipation in cases in which the relation has been created subsequently to the enactment of that Code, we submit that assuming, for the sake of the argument, the premise established by the Court, the conclusion reached by its reasoning with regard to the interpretation to be given Section 581 of the Code of Civil Procedure is absolutely sound. The same conclusion may also be established by other important considerations, as we shall proceed to demonstrate.

(c) THE RIGHT OF USUFRUCT ENJOYED BY PARENTS UNDER THE CIVIL CODE WAS PROPERTY OF WHICH THEY COULD NOT BE DEPRIVED WITHOUT DUE PROCESS OF LAW.

It is respectfully submitted that any other conclusion than that reached by the lower court in its interpretation of Section 581 of the Code of Civil Procedure would have

made that statute, as it is construed by the lower court, repugnant to the provisions of the Philippine Bill as regards persons who at the time of its enactment were lawfully in the enjoyment of the right of usufruct of the property of their minor children conferred by the Civil Code.

It admits of no dispute that when the Code of Civil Procedure was enacted in 1902 Doña Isabel Pálet was lawfully vested with the right of administration and usufruct of the property of her minor children subject to her parental authority. The conclusion in this regard is the same whether we consider the matter from the standpoint of the national law of Doña Isabel Palet and her children or whether we regard it from the standpoint of the law in force in the Philippine Islands, for prior to the enactment of the present Code of Civil Procedure the law of Spain and of the Philippine Islands in this regard was absolutely identical, nor can it be doubted that the right so enjoyed by Doña Isabel Palet and other parents similarly situated was a valuable property right. The usufructuary of the property of another is entitled (Civil Code 471) to the natural, civil, and industrial revenue of the property subject to this right. During the existence of the usufruct the beneficial ownership is vested in the usufructuary, the owner of the property having nothing but the naked title and the expectancy of the reversion of the usufruct. There can, of course, be no doubt that such a right is in many instances of immense value, and that it is property in every sense of the word. The instructions of President McKinley to the Philippine Commission dated April 7, 1900 (Volume 5, Fed. Stat. Ann. [First edition], p. 742), limited the delegated legislative power under which the Philippine Code of Civil Procedure was enacted by the "inviolable rule" that no person should be "deprived of life, liberty or property without due process of law." If

the lower court is correct in its conclusion that the Code of Civil Procedure has repealed by implication those provisions of the Civil Code by which parents were vested with the usufruct of the property of their minor children, to apply the new law to existing rights of usufruct vested under the Civil Code would be to deprive parents enjoying such rights of valuable property, merely by legislative decree. It is not to be assumed that the Philippine Commission intended to disregard the instructions of President McKinley, and Section 581 of the Code, excluding all pending guardianships from its operation, must be construed in the light of what the effect would be were it to be held that its terms are not broad enough to include pending cases of *patria potestas*.

While the argument of expediency is never admissible to modify the express will of the legislature it is permissible to show that one or the other of two conflicting interpretations will be productive of great harm. Were it to be held that the new Code of Civil Procedure did in fact repeal the law conferring upon parents the right of usufruct of their children's estates and that the effect of this repeal was to destroy rights *in esse* at the time of the enactment of the repealing statute, a bewildering mass of litigation between parent and child might befront the Philippine Courts. It is beyond question that the people of the Islands proceeded upon the presumption, justified by the express opinion of the highest court of the country, that pending estates subject to the *patria potestas* were not affected and that parents continued to administer and usufruct the property of their minor children upon that assumption. To reverse the rule at this late day would be to introduce appalling confusion and strife where peace and order now prevail.

(*d*) THE CODE OF CIVIL PROCEDURE HAS NOT REPEALED BY IMPLICATION THOSE PROVISIONS OF THE CIVIL CODE WHICH RELATE TO THE EMANCIPATION OF MINORS.

While we are fully convinced of the soundness of the conclusion of the lower court as to the effect of the exception contained in Section 581, we are equally convinced that the Court was in error in its conclusion that Section 551 of the later Code has repealed by implication that part of the Civil Code authorizing parents to emancipate their minor children. The practical result will, of course, be the same, whether the ground of the decision be that pending cases of *patria potestas* were exempted from the operation of the implied appeal by the terms of Sec. 581, or that Sec. 551, properly construed, does not amount to a repeal of the old law regarding emancipation of minors by their parents.

A demonstration of the correctness of the conclusion of the Court, while rejecting its reasoning upon this feature of the case, involves a consideration of the *patria potestas* as the institution existed in the civil law of Spain and of the Philippines at the time of the transfer of the sovereignty over the Philippine Archipelago to the United States.

The law on the subject was wholly statutory, and will be found in the Civil Code as Title Seven of Book One (Articles 154 to 180, inclusive) and in Title Eleven of the same Book (Articles 314 to 324, inclusive). From an examination of the text of these sections of the Code, of which a fairly satisfactory translation will be found in Walton's Civil Law in Spain and Spanish America, it will be apparent that the authority (*potestad*) which the Spanish law conferred upon parents related to their control—

(*a*) Over the persons of their minor children and to

(*b*) Their control over and interest in the property of their minor children.

Don Modesto Falcon in his work entitled "Derecho Civil Español, Comun y Foral" (Vol. One, p. 261), says that the *patria potestas* is

> the sum total of all the rights which the law, in harmony with nature, has granted to the father, or, in his default, to the mother, for the control of their unemancipated legitimate and natural children, and the management of their affairs.

Summarizing his analysis of the subject, the same author says (op. cit. Vol. 1, p. 265) of the *patria potestas:*

> This authority confers upon the father, or, in his default, upon the mother, the following rights:
>
> 1. The right to the obedience of their children during minority, and to their respect and reverence after their emancipation;
>
> 2. The right to have their children live in their company;
>
> 3. The right to represent them in judicial proceedings;
>
> 4. The right to consent to the acts performed, and contracts entered into by them;
>
> 5. The right to correct and punish them in moderation;
>
> 6. The right to give consent to or advice concerning the marriage of their children;
>
> 7. The right to become the owners of certain of their children's earnings, and of the revenue of their children's property in the manner hereinafter explained;
>
> 8. The right to administer the property of their children.

It is evident, therefore, that the *patria potestas* confers a number of rights, each independent of the other. It must be conceded, upon consideration, that no one of these rights, considered apart from the others, is so essential to the existence of the *patria potestas* as an institution

that its withdrawal would necessarily carry with it the disappearance of all or any of the others. For instance, the repeal of Chapter 3 of Title 7 of Book 1 of the Civil Code (Articles 159 to 166, inclusive), which deals with the "Effects of the *Patria Potestas* with respect to the Property of Children," would not carry with it, by necessary implication, the repeal of Chapter 2 of that Title which deals with the "Effect of the *Patria Potestas* with respect to the Persons of the Children." Therefore, even if it were to be admitted that Articles 551, 552 and 553 of the Code of Civil Procedure (Act 190 of the Philippine Commission) must be construed as depriving parents of the right of usufruct and administration of their children's property enjoyed under the Civil Code, this would not imply a repeal of the power of emancipation conferred by Section 316 of the Civil Code, and which clearly pertains to that branch of the *patria potestas* which relates to the control of parents over the persons of their children rather than that which pertains to their interest in and control over the property of such children.

The Civil Code contains in itself intrinsic evidence of the belief of the legislature that the *patria potestas* was not a unit which must exist intact or not at all, but rather a congeries of rights and obligations, some of which might be withdrawn without affecting the others.

Article 171 of the Civil Code reads as follows:

> The Courts may deprive parents of the *patria potestas*, or suspend its exercise, if they should treat their children with excessive severity, or give them corrupting orders, advice, or examples.
>
> In these cases they may also deprive parents wholly or partially of the usufruct of the property of their children, or take such measures as they may deem conducive to the interests of the latter.

It is evident from the terms of this article that before the enactment of the Philippine Code of Civil Procedure

the courts were authorized, in the prescribed cases, to deprive parents of the custody of their children or the enjoyment of the usufruct of their property. The withdrawal of either of these privileges from the offending parent would leave the other intact. The parent from whom the right of usufruct or administration of his children's property has been withdrawn would not, we submit, have been thereby deprived of the right to emancipate them. The power of emancipation pertains more to that branch of the *patria potestas* under which parents exercise control over the persons of their children, than to that which relates to the control of their property. In the vast majority of instances, children under the *patria potestas* possess no property to which the interest of the parent could attach. Consequently even were it to be finally determined that Section 553 of the Code of Civil Procedure, because of its declaration that the guardianship of the estate of the child does not pertain as of right to the parent, has indeed repealed that part of the Civil Code (Articles 159 to 172) by which parents were endowed with the right of administration and usufruct of such estates, we submit that it would not necessarily follow that parents were thereby deprived of the right to emancipate their minor children.

The lower court (Decision, Rec. pp. 159 to 162, inclusive, Case 25,411) was of the opinion that Section 551 of the Code of Civil Procedure has repealed by implication those provisions of the Civil Code relating to the administration and usufruct by parents of the property of their children. The gist of the argument is that it is evident from a perusal of Sections 551, 552 and 553 of the Code of Civil Procedure that the Philippine Legislature intended to include within their provisions, relating to the guardianship of minor children, those whose parents were alive as well as those not enjoying such natural protection.

The Court correctly states that under the Civil Code guardianship was something entirely distinct from the *patria potestas*, and that it was only children not subject to the *patria potestas* who could be brought under guardianship. The Court concludes:

> The truth is that the *patria potestas* and the present law of guardianship cover the same subject, *i. e.*, the custody and the care of the persons and property of minor children whose parents, or one of them, is living. * * * The provisions of the two laws are entirely repugnant to each other; they are totally irreconcilable if any proper respect is to be had for the language used in the latest law and the evident intention of the legislative department in enacting it. The former must therefore yield to the latter.

Strictly speaking, this part of the decision of the lower court is *obiter dicta*, for this case does not here, or did it below, present any issue regarding the right of a parent under the law now enforced in the Philippine Islands to enjoy the administration or usufruct of the property of a minor child.

The questions were: (1) whether under the present law a parent may emancipate a minor child; and (2) if the first question be answered in the negative with respect to cases arising after the enactment of the Code of Civil Procedure, whether the provisions of that Code can be construed as depriving of that right parents already in the enjoyment of it under the Civil Code when the latter law was enacted.

But while, being merely *obiter*, it is not of great importance to dispute this particular conclusion of the lower court, we cannot refrain from expressing our dissent from it and our belief that there is no such irreconcilable conflict between the old law and the new as to work a repeal by implication of the former in respect to the rights of a parent to the administration and usufruct of the property of his minor children.

A careful examination of Sections 551, 552 and 553 of the Code of Civil Procedure will disclose that the only Article of the Civil Code which is really affected by those Sections is Article 159, and that only with respect to the *form* of exercising the right which this article establishes in favor of parents with respect to the administration of the property of their minor children. Section 551 confers upon Courts of First Instance the discretional authority to appoint guardians for minors who have no guardians legally appointed when such appointment appears to be necessary or convenient. Section 552 deprives the family council of the power to appoint guardians. Section 553 is the only one which, under any possible interpretation, can be in any manner regarded as affecting the institution of *patria potestas*. It reads as follows:

> SEC. 553. *Father or Mother Natural Guardian and to be appointed Guardian of Estate, if Competent.* The father, or in case of his death or legal disqualification, the mother, is to be deemed the natural guardian of the child, and as such is entitled to the custody, and care for the education, of the minor, but not of his estate, unless so ordered by the court. It shall be the duty of the judge, in the appointment of a guardian of the estate of a minor child, to appoint the father or mother or near relative of the child, preference being given in the order just named; but the court shall have the power to set aside the order of preference herein provided and to appoint any suitable person as guardian, either of the person or of the estate of the minor, or both, as the best interests of the child may require. The authority of the guardian shall not be extinguished or affected by the marriage of the guardian.
>
> Sec. 553, Act 190 Phil. Com.

An analysis of Section 553, we submit, will show that there is no necessary conflict between its provisions and those of the Civil Code relating to the relation of parent

and child, and that it merely modifies the *form* of the exercise of one of the rights inherent in this relation, namely: that enjoyed by parents with regard to the administration of the property of their children. Section 553 recognizes the right of the father, or in case of his death or incapacity, of the mother, to have the minor children in his or her custody and control for the purpose of educating them. This section also provides that although parents have no absolute right to the administration of the property of their children, it is nevertheless the *duty* of the judge to confer upon them the authority necessary for this administration unless for special reasons the Court should be convinced that the interests of the minor require the appointment of some other person. A law which, as does Section 553 of the Code of Civil Procedure, declares that the father is not entitled to the administration of the property of his children unless the Court so orders, but immediately thereafter declares that it is the *duty* of the judge to grant this administration to the father unless for special reasons he should deem it necessary, in the interest of the minor, to appoint some other person, is, to all practical intents and purposes, the same as a law which declares, as does Article 159 of the Civil Code, that the father is the legal administrator of the property of his children subject to his *potestas*, and then authorizes the courts, as does Article 171 of the Civil Code, to deprive the father of the *patria potestas*, and consequently of the power of administration of such property, whenever in the judgment of the Court such action is necessary for the benefit of the children. It also appears evident that the only difference between the two systems is that under the system of the Civil Code the right of administration is exercised without the necessity of first obtaining judicial authorization to that end, whereas, under the provisions of the Code of Civil Procedure, it is

necessary to obtain such authorization, the granting of which is a mere matter of form.

One of the most important rights which the Spanish civil law vests in parents with respect to the property of their children is that of enjoying the usufruct of such property, which is co-relative to the obligation of giving them support. We contend that there is nothing incompatible between compliance with the formality of obtaining judicial authority for the administration of the property of one's children and the enjoyment of the right to the usufruct of such property conferred upon parents vested with the *patria potestas* under the Civil Code.

Even were the Court to appoint some other person than the parent as guardian of the property of the child, it would not of necessity follow that the parent would be deprived of his right to the enjoyment of the revenue of the child's estate, unless expressly deprived of it by the Court in the exercise of the authority to that end conferred by Article 171 of the Civil Code.

(*e*) EVEN IF IT BE HELD THAT THE NEW CODE OF CIVIL PROCEDURE OF THE PHILIPPINE ISLANDS HAS REPEALED BY IMPLICATION THOSE PROVISIONS OF THE CIVIL CODE RELATING TO THE ADMINISTRATION AND USUFRUCT BY PARENTS OF THE PROPERTY OF THEIR MINOR CHILDREN, IT HAS NOT REPEALED THE PROVISIONS OF THE CIVIL CODE RELATING TO EMANCIPATION.

The lower court, having established the premise of the repeal by implication of those provisions of the Civil Code relating to the administration and usufruct by parents of the property of their minor children (Rec. p. 162, Case 25,411), says:

> The provisions of the new Code of Civil Procedure on guardianship being applicable to minor children whose parents, or one of them, are still living, it is

clear that these articles of the Civil Code relating to the emancipation of minors by their parents are also, partially at least, repealed. By reference to these articles (314-319), it will be noted that by emancipating his child the parent surrenders to it the right to the usufruct and administration of his property. This, of course, is based upon the *a priori* condition of the law of the *patria potestas* that the parent has the usufruct and administration of the child's property to give, which we have seen, he no longer has. Not having a right in the child's property, the formal emancipation of a minor child by the parent cannot now have the effect prescribed in Articles 314–319 of the Civil Code. For were this power of emancipating his minor child still retained by the parent, the latter could, by the exercise of it, deprive the court guardian of the administration and control of the estate, or in other words the court proceedings with reference to the persons and property of minor children would by the parent's act be annulled.

The Court then proceeds to show that

> the *patria potestas* of the Civil Code with respect to the persons of minor children is not inconsistent with the natural law of guardianship.

Rec. p. 163, Case 25,411.

With the last cited part of the conclusions of the lower court we are entirely in accord, but we believe it is in error in its conclusion that the elimination of the right of administration and usufruct would by necessary implication carry with it the loss of the power of emancipation in all cases.

Repeals by implication not favored.—It is, of course, axiomatic that a later law will not be held to have repealed an earlier expression of the legislative will unless the repugnance between the two statutes is so marked that by no reasonable construction can they be reconciled. The intention of the legislature to repeal the old law must be

as plainly apparent as though it had been in terms expressed.

We have even stronger grounds than those usually existing for invoking in this case that principle of interpretation of statutes which imposes upon courts the duty of avoiding by all reasonable means such a construction of the law as will lead to a repeal by implication, inasmuch as the Court is here asked to hold that there had been a repeal by implication of a statute relating to one of the most important institutions known to the Philippine substantive law of domestic relations. In the interpretation of a code of civil procedure, which should contain matters of adjective law only, it will not be readily assumed that the legislature intended to repeal by implication the fundamental principles of the rules of law governing the relations of parent and child, especially when we bear in mind that the Commission by which that Code was enacted derived its powers at that time from the instructions of President McKinley, dated April 7, 1900, in which the commissioners were warned that the main body of the laws which regulate the rights and obligations of the people was to be maintained with the least possible change, and that such modifications as might be found necessary should be made principally in matters of procedure.

Fed. Stat. Ann. (1st ed.) Vol. 5, p. 744.

(*f*) EMANCIPATION NOT DEPENDENT UPON THE EXISTENCE OF PROPERTY.

We contend that the error of the lower court lies in its assumption that the power of emancipation

> is based upon the *a priori* condition of the law of *patria potestas* that the parent has the usufruct and administration of the child's property to give. * * *

We submit that there is nothing in the language of the Civil Code provisions relating to emancipation to justify this inference. The pertinent articles are:

> ART. 314. Emancipation takes place: (1) By the marriage of the minor; (2) by attainment of majority; (3) by concession of the father or of the mother exercising the *patria potestas*.
>
> ART. 315. Marriage effects emancipation *de jure*, with the limitations established by Art. 59 and the third paragraph of Art. 50.
>
> ART. 316. The emancipation to which paragraph three of Art. 314 relates shall be granted by public instrument. * * *
>
> ART. 317. Emancipation empowers the minor to control his person and property, but until he attains his majority an emancipated minor may not borrow money, or encumber or sell real property without the consent of his father, or, in default of the latter, of his mother, or failing both, that of a guardian. Nor may he be a party to an action without the joinder of such persons.
>
> ART. 318. In order that emancipation may take place by grant of the father or of the mother it is necessary that the minor be over the age of eighteen years and that he consent thereto.
>
> ART. 319. Emancipation once granted may not be revoked.

Emancipation, it will be observed, is a term used by the law to cover all the various modes by which minority is ended, grant by the parent being but one of them.

There is absolutely nothing in any of the articles of the Civil Code above cited, which are the only ones bearing upon the subject, which will justify the inference that parents cannot emancipate their children by voluntary concession unless such children have property, the administration and usufruct of which may be renounced by the parent. All that is necessary is that the parent shall at the time of making the grant be in the enjoyment of the

patria potestas. This may or may not include the usufruct of property, according to whether the child subject to the *potestas* possesses or does not possess property to which that right can attach. There is nothing, we submit, in the articles relating to emancipation which would have been effected had the legislature expressly repealed the whole of chapter 2 (Articles 159 to 166, inclusive) of Title 7 of Book 1 of the Civil Code.

With respect to the argument that the power of voluntary emancipation might deprive a guardian appointed by the Court of his control of the person or property of a minor, the answer is that Articles 314 to 319 of the Civil Code determine the conditions upon which minority ceases. Minority ceases, by the terms of Article 314 (supra), not only by the attainment of the age of majority (Article 320), but equally by marriage or by parental grant. A married person under the age of twenty-three is no longer a *minor*. Neither is a person over eighteen or under twenty-three upon whom the parent has conferred the grant of majority. As Bar says in his work on Private International Law,

> Such a case has to be regarded * * * in the same light as if the *lex domicilii* appointed an earlier age as the initial age of majority for all its subjects.
>
> Bar, Pri. Int. Law, Par. 149.

Now, the Code of Civil Procedure (Act 190) nowhere attempts to define minority. In its provisions relating to the subject of guardianship, it authorizes the court to appoint guardians for "minors." But for the purpose of ascertaining who are minors we must have recourse to the Civil Code. An examination of the Code shows that adults are persons over the age of twenty-three years or persons who, being over the age of eighteen years, have received, with their consent, the grant of majority, or who have married.

For none of these persons could the Court appoint a guardian under the Code of Civil Procedure. As to persons for whom guardians have been appointed during minority such guardianship must be held to cease as soon as their minority ceases in either of the manners recognized by the Civil Code (Article 314) as producing emancipation. A special exception is made by Article 575 of the Code of Civil Procedure with regard to marriage, the rule being that the marriage of the minor ward terminates the guardianship of the person of such ward but not that of the estate.

(g) THE EMANCIPATION OF THE APPELLANTS, JOAQUIN IBAÑEZ DE ALDECOA AND ZOILO IBAÑEZ DE ALDECOA, WAS VALID IN POINT OF FORM.

It was contended in the court below that the documents by which the appellants were emancipated were not "public instruments" within the meaning of Article 316 of the Civil Code. On that subject the lower court said (Rec. p. 170, Case 25,411):

> It is urged finally that admitting all else, emancipation of the plaintiffs could not be valid because the admitted emancipation was not contained in a public instrument, as required by Article 316 of the Civil Code. This article provides that the emancipation by the concession of the father exercising the *patria potestad* shall be granted by a public instrument or by an appearance before a municipal judge. In the case at bar the emancipation documents were acknowledged and duly executed before a notary public in 1903. The notary public exercised his authority not by virtue of the Spanish law, but under authority of Act No. 136. A document acknowledged before a notary public, in accordance with the provisions of an act of the Philippine Commission, is a public instrument within the meaning of Article 1924 of the Civil Code. (Gochico *v.* Ocampo, 7 Phil. Rep. 15; Soler *v.* Alzoua,

8 Phil. Rep. 539; De la Rama *v.* Robles, 8 Phil. Rep. 712; McMicking *v.* Kimura, 12 Phil. Rep. 98.) The phrase referred to in Article 1824 of the Civil Code and which was brought in question in these cases reads: "In a public instrument"—"escritura publica." Exactly the same words, "excritura publica," are used in Article 316. If a document which was acknowledged before a notary public appointed under an act of the Commission, was a public document within the meaning of that phrase in Article 1924, it certainly must be held to be a public document within the meaning of that phrase in article 316, as both are exactly the same.

Rec. p. 170, Case 25,411.

The same result follows if the validity of the emancipation be tested by the national law of the appellants. The Spanish Civil Code expressly recognizes the principle *locus regit actum*. Article 11 of that Code declares that

> The forms and solemnities of contracts, wills and other public instruments are governed by the laws of the country in which they are executed.

POINT TWO.

THE APPELLANTS JOAQUIN AND ZOILO IBAÑEZ DE ALDECOA AND THEIR MOTHER DOÑA ISABEL PALET ARE SUBJECTS OF THE KINGDOM OF SPAIN.

In the court below it was contended by these appellants that they were possessed of the political status of Filipinos, having been born in the Philippine Islands, and that as such the determination of their status as minors or majors was to be governed by the law of the Philippine Islands. We have already demonstrated that the decision of the lower court is correct under the Philippine law, both upon the reasoning actually employed by the Court, and upon other grounds which might be relied upon. We shall now proceed to demonstrate that the pleadings and proofs show that these appellants are in fact foreigners, subjects of the Kingdom of Spain, that under the law of the Philippine Islands the status and capacity of foreigners is to be determined by their national law, and that under the national law of these appellants they were validly emancipated by their mother,and therefore capable of binding themselves by the contract here in dispute.

While the cancellation suit brought against the Hong Kong Banking Corporation by Joaquin and Zoilo Aldecoa was pending on appeal in the Supreme Court of the Philippine Islands counsel for the respective parties signed and submitted to that Court, in Spanish, a stipulation of facts translated in the record in the following terms:

> Now come plaintiffs in this case and defendant, the Hong Kong and Shanghai Banking Corporation. through their respective attorneys before this Honorable Court and respectfully state:
>
> That for the purposes of the decision in this case the parties litigant above mentioned have agreed that

the facts hereinafter stated are true and ask this Court to consider them as if they have been included as proven facts in the decision of the lower court:

1. That plaintiffs Joaquin Ibañez de Aldecoa and Zoilo Ibañez de Aldecoa were born in the Philippine Islands on March 27, 1884, and July 4, 1885, respectively.

2. That said plaintiffs are the legitimate children of the deceased Don Zoilo Ibañez de Aldecoa and of Doña Isabel Palet, his widow.

3. That said Zoilo Ibañez de Aldecoa, now deceased, and his widow Doña Isabel Palet were both Spaniards, natives of Spain, born of Spanish parents.

4. That the deceased Don Zoilo Ibañez de Aldecoa, father of said plaintiffs, being a resident of and domiciled in the Philippine Islands, died in Manila on October 4, 1895.

5. That Doña Isabel Palet, viuda de Aldecoa, mother of these plaintiffs, being a resident of and domiciled in the Philippine Islands, by reason of her poor health left the Philippine Islands on or about the year 1897 and was absent from said Islands until the year 1902, when she returned to the same and preserved her domicile therein until the year 1906.

6. That plaintiffs Joaquin Ibañez de Aldecoa and Zoilo Ibañez de Aldecoa were absent from the Philippine Islands in the company of their mother from the year 1897 until they came back to the Islands on or about the year 1902, where they had been continuously residing and have at present their legal residence.

7. That plaintiffs Joaquin and Zoilo Ibañez de Aldecoa from the time of their return to the Philippines in the year 1902, have several times stated before the judicial authorities and before the administration officials to be Filipinos and as such they have obtained passports from the American administrative and consular authorities.

Rec. p. 155, Case 25,411.

This stipulation was approved by the Supreme Court by order dated February 7, 1912 (Rec. p. 156, Case 25,411),

and it is in effect incorporated into the findings of the lower court in its decision in the cancellation case (Rec. p. 158). Practically the same facts are included in the findings of the trial court (Par. V) in its decision in the foreclosure case (Rec. p. 375, Case 25,412) and in the decision of the Supreme Court of the Philippine Islands upon appeal in the foreclosure case (Rec. 394, Case 25,412).

It is respectfully submitted that upon the facts thus uncontrovertibly established the appellants Joaquin and Zoilo Aldecoa are clearly shown to be Spanish subjects.

(*a*) DOÑA ISABEL PALET WAS A SPANISH SUBJECT WHEN SHE LEFT THE PHILIPPINE ISLANDS IN 1897 AND HAS RETAINED HER SPANISH NATIONALITY.

As Mrs. Isabel Palet was a native of Spain and was the wife of a native of Spain and both of them were of Spanish parentage (Rec. p. 25, Case 25,411) there can, of course, be no doubt that she possessed the same national character when she left the Philippine Islands in 1897 with her sons Joaquin and Zoilo. In fact it has been expressly stipulated in open court that

> Doña Isabel Palet is a native of Barcelona, Spain, and is now and has at all times mentioned in this suit been a subject of the Kingdom of Spain.
>
> Rec. p. 156, Case 25,412.

The truth of the facts covered by this stipulation was expressly admitted by Mr. Miranda, the attorney who appeared at the trial of the case for Mrs. Palet and her children.

> Rec. p. 156, Case 25,412.

The year following Mrs. Palet's departure from the Philippines with her children, the appellants, the war between the United States and Spain occurred, resulting

in the cessation of Spanish sovereignty in the Philippine Islands under the terms of the Treaty of Paris. Article 9 of the Treaty of Paris provided that Spanish subjects, natives of the Peninsula, who may elect to remain in the ceded territory

> may preserve their allegiance to the Crown of Spain by making before a Court of Record, within a year from the date of exchange of the ratifications of this Treaty, a declaration of their intention to preserve such allegiance, in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory within which they may reside.

As Mrs. Isabel Palet did not return to the Philippine Islands with her sons until 1903 she was absent during the entire period within which *resident* Spanish subjects in the Philippine Islands were required to take affirmative action to retain their Spanish nationality. This Court, in the case of Bosque *v.* U. S., 209 U. S. 96, has held that under such circumstances Spanish nationality is retained by the absentee Spanish resident regardless of the retainance of the Philippine *domicile*. In that case the Court said:

> * * * plaintiff was absent from the Philippines during the whole period allowed for making such declaration, and remained away several months after its expiration. It follows that he did not become a citizen of the Islands under the new sovereignty, but that he continued to remain a Spaniard. The fact that he intended to return does not affect this conclusion. It was not necessary, in order to retain his Spanish nationality that he should remain away permanently, and he was absent for more than a year and a half.

This case is directly in point and, it is submitted, absolutely conclusive as regards the national status of Doña Isabel Palet.

(*b*) RETENTION OF SPANISH NATIONALITY BY THE FATHER OR MOTHER IMPLIES THE RETENTION OF THE SAME NATIONALITY BY THE MINOR CHILDREN OF SUCH PARENTS.

The stipulation and findings establish the fact that the appellants Joaquin and Zoilo Aldecoa were born in the Philippine Islands in the years 1884 and 1885, respectively; that they departed from the Philippine Islands with their widowed mother, Mrs. Isabel Palet, in 1897 and returned with her to the Islands in 1903. In the lower court it was contended by opposing counsel that the appellants are Filipinos because they were born in the Philippine Islands. It is not believed that any authorities can be cited in support of this contention. The contrary proposition, however, is well established.

This question has come up several times in the Federal Court of Porto Rico. The jurisdiction of that court depends in many instances upon diversity of citizenship of the parties litigant and, as is to be expected, in many cases the jurisdiction of the Court has been attacked on the ground that the alleged diversity of citizenship did not exist. This question arose in the case of Martinez de Hernandez *v.* Castro, 2 Porto Rico Fed. Reps. 523, in which the Court, after having carefully considered the argument of counsel for the party attacking the Court's jurisdiction upon the gound that with respect to persons born in Porto Rico their parents were unable to deprive them of the nationality of that territory by means of a declaration of their intention to preserve Spanish nationality, held that the only reasonable interpretation which could be given to Article 9 of the Treaty of Paris was that it confers upon the Spanish subject not only

> the privilege of retaining his own allegiance to the Spanish crown, but also that of his wife and their minor children.

In another decision of that Court involving the same question, Maria Rios de Rubio *v.* Victor Burset, 2 Porto Rico Fed. Reps. 192, it was held that

> It certainly is within the meaning of the Treaty that when a man, being, in the language of Article 9, a Spanish subject, native of the peninsula, preserved his Spanish citizenship under that article, it carried with him the citizenship of his wife, whether or not he mentioned her in his declaration.

The Supreme Court of the Philippine Islands, in passing upon the application of Don José Arnaiz for permission to take the bar examination, upon evidence that although petitioner was a native of Cuba, his father was a native of the Spanish peninsula, and a resident of the Philippine Islands during all the period allowed by the Treaty of Paris, who, having failed to declare his intention to preserve his Spanish nationality, had acquired that of the Philippine Islands, said:

> Whereas by virtue of the provisions of Article 18 of the Civil Code, applicable to the case before us, a child under parental authority (*patria potestas*) follows the nationality of his own father, and Tomas Arnaiz having acquired citizenship in these Islands, it follows necessarily that his son, José, who like the former has ceased to be a Spaniard, has also become a citizen of the Islands,
>
> Held, that the petitioner, José Arnaiz, is qualified to enter the examinations required for admission to the bar.

The action of the Court in the Arnaiz case was not reported, and the citation from the resolution is copied from the original record in the files of the Philippine Supreme Court.

(*c*) THE APPELLANTS JOAQUIN AND ZOILO IBAÑEZ DE ALDECOA HAVE NOT BECOME CITIZENS OF THE PHILIPPINE ISLANDS.

Although in our opinion it would make no difference in the decision of the questions involved had the defendants Joaquin and Zoilo Ibañez de Aldecoa subsequently acquired the political status of Filipinos, because having once become vested with contractual capacity by emancipation conferred in accordance with their national law, the change of nationality would not divest them of that capacity, it is nevertheless not wholly beside the mark to point out that no such change of nationality has been possible. It is stipulated of record that these defendants ever since their return to the Philippine Islands in 1902 have stated whenever the occasion presented itself that they were Filipinos, (Rec. p. 156, Case 25,411) and that these statements have been accepted as true by some of the administrative and consular officers of the government. The fact that such officers may have fallen into error in this respect is not in itself, of course, sufficient to change the national status of these defendants. After the cession of the Philippines by Spain to the United States the power to authorize the acquisition of the nationality of the territory by persons not vested with it under the terms of the Treaty of Paris pertained solely to Congress. Consequently Article 19 of the Civil Code, which provides that children of foreign parentage born in Spanish territory should be given the right of election as to whether they shall retain the nationality of their parents or that of the territory of their birth upon obtaining their majority, must be deemed as repealed by the mere change of sovereignty, inasmuch as the subject matter of the article pertains to purely political rather than to private law.

POINT THREE.

THE EMANCIPATION OF THE APPELLANTS JOAQUIN AND ZOILO IBAÑEZ DE ALDECOA WAS VALID UNDER THEIR NATIONAL LAW.

On July 31, 1903, while in the city of Manila, Philippine Islands, Mrs. Isabel Palet, being at that time a widow, executed in behalf of her sons Joaquin and Zoilo Ibañez de Aldecoa the deeds of emancipation introduced in evidence as plaintiff's Exhibits T and U (Rec. pp. 203 to 204, Case 25,412). At that time Joaquin and Zoilo Ibañez de Aldecoa were each over the age of eighteen years. They expressed their acceptance of the emancipation by signing the instruments in which the grants were recorded.

Findings, Trial Court, Rec. p. 374, Case 25,412.

One of the instruments in question, which are drawn in identical terms, except with regard to the names of the parties, has been set out in full in the general statement of facts (*Ante*. p. 8).

The law in force in Spain after the cessation of the Spanish sovereignty in the Philippine Islands being foreign law, and not open to judicial notice, evidence was introduced at the trial in behalf of the Hong Kong Banking Corporation for the purpose of showing that the emancipation of Joaquin and Zoilo Ibañez de Aldecoa was valid and binding under their national law. For that purpose we introduced as one of our witnesses the late Dr. Rafael Del Pan, an eminent authority on the Spanish law, and then a number of the Code Committee appointed by the Governor General to revise the Philippine Codes. It was admitted in open court by counsel for Joaquin and Zoilo Ibañez de Aldecoa that Dr. Rafael Del Pan has a thorough knowledge of the Spanish laws and that he is

a graduate of the University of Madrid and a Doctor of Laws in that University, qualified by his knowledge of law to practice in the kingdom of Spain. (Rec. p. 162, Case 25,412.)

Dr. Rafael Del Pan testified in response to the inquiry as to what was the law in force in Spain in 1903 with regard to the power of parents to emancipate their children as follows:

A. Practically the same rules were in force as those which are embodied in the Civil Code now in force in these Islands, but without the modifications in that Civil Code which have been introduced in it in the Philippine Islands since the change of sovereignty by the various acts of legislation of the Philippine Commission, and subsequently by the Philippine Assembly.

Q. Please examine this volume which I show you and which purports to be a copy of the Civil Code, and indicate to us the articles of that Code relating to emancipation, which were in force in Spain in the year 1903.

A. Article 167, second paragraph, of the Civil Code, provides for the termination of the *patria potestas* by means of emancipation. Article 314, in connection with the article just referred to, provides the manner by which the emancipation may be effected; and these methods of emancipation are: The marriage of the person to be emancipated; his coming of age; and by grant or concession of the father or mother exercising the parental authority or *patria potestad*. And articles 315 to 319, inclusive, determine the effects of emancipation. There are other provisions apart from these which I have just referred to, and which are those directly applicable to the matter, others scattered through the law which incidentally bear upon the matter.

Q. According to the law in force in the Kingdom of Spain in 1903, under what circumstances was the mother entitled to exercise parental authority, or the *patria potestad* as it was called in the Spanish law?

A. The *patria potestad* is exercised by, and corresponds to, the mother upon the death or incapacity of the father.

Q. Is the exercise by the mother of the power of *patria potestad*, in force in Spain in 1903, over her minor children, absolute and unqualified?

A. Yes, sir; so absolute and unqualified that the power vests in the mother immediately upon the death of the father of the children, without the necessity of any formal declaration. Before the Civil Code was enacted in Spain the mother was entitled to the guardianship of the persons and property of her minor children very much as she is under the law now in force in the Philippine Islands, but this was changed by the provisions of the Civil Code which conferred upon her the *patria potestad* upon the death of the husband.

Q. Article 9 of the Civil Code, now in force in the Philippine Islands, reads as follows: "Las leyes relativas a los derechos y deberes de familia, o al estado, condicion y capacidad legal de las personas, obligan a los espanoles aunque residan en pais extrangero." (The laws relative to family rights and duties or to the status, condition and legal capacity of persons are binding on Spaniards, even though they reside in sovereign countries.) Can you inform us whether or not this provision or a similar or identical provision was in force in the Kingdom of Spain in the year 1903?

A. According to my recollection, identical.

Q. Under the laws in force in the Kingdom of Spain in 1903, up to what time were children subject to the *patria potestad*? In other words, when did the *patria potestad* cease?

A. On arriving at 23 years of age or, that is to say, the limit of minority; or, in case of emancipation by concession of the father, or in his absence or defect by the mother, after the child had reached the age of 18 years.

The Court will take judicial notice of the fact that the Civil Code in force in the Philippine Islands at the time of

the cession of Spanish sovereignty was first promulgated in Spain and later extended to the Spanish Colonies, including the Philippine Islands. The provisions of the Code relating to the emancipation of minors, which, Dr. Rafael Del Pan has testified, was still in force in 1903, are as follows:

> ARTICLE 167. Parental authority (*patria potestas*) is terminated (1) by the death of the parents or of the children; (2) by emancipation; (3) by the adoption of the child.
>
> ARTICLE 314. Parental authority is also terminated: (1) by the marriage of the minor; (2) by the attainment of majority.
>
> ARTICLE 316. The emancipation to which paragraph 3 of Article 314 refers must be granted by public instrument or by appearance before the municipal Judge, and must be noted in the Civil Register until which time it will not produce effects against third persons.
>
> ARTICLE 317. Emancipation empowers the minor to control his person and property as though he were of age, but until he attains his majority, an emancipated minor may not borrow money or sell real property without the consent of his father, or in defect of the latter his mother, or in defect of both of a guardian, nor may he appear in court without the assistance of said persons.
>
> ARTICLE 318. In order that emancipation by the concession of the father or mother may take place it is necessary that the minor shall have attained the age of eighteen years, and that he consent to it.
>
> ARTICLE 319. Emancipation once granted may not be revoked.

The parental authority of the mother over her minor children upon the death of their father is conferred by the following provisions of the Spanish Civil Code:

> ARTICLE 154. The father or failing him the mother have authority (*potestas*) over their emancipated legitimate children. * * *

Article 168 of the Code provides that the mother loses the power of parental authority over her children if she contracts a second marriage, unless her deceased husband, the father of said children, has otherwise directed by will.

The emancipation was effected, as required by Article 316, by public instrument. While there is some little difference between the external formalities of public instruments when they are drawn in Spain pursuant to the notarial law of that country and the documents authenticated by a Notary Public in the Philippine Islands, the Philippine Supreme Court has held that such documents are public instruments within the meaning of that term as used in the Civil Code.

> Gochico *v.* Ocampo, 7 Phil. Reps. 15.
> McMicking *v.* Kimura, 12 Phil. Reps. 98.

(*a*) THE POWER OF A SPANISH PARENT TO EMANCIPATE A MINOR CHILD SUBJECT TO THE PATRIA POTESTAS MAY BE EXERCISED ABROAD.

Article 9 of the Spanish Civil Code in force in Spain in 1903 (testimony of Dr. Rafael Del Pan, Rec. p. 163, Case 25,412) and in the Philippine Islands reads as follows:

> The laws relative to family rights and duties or the status, condition, and legal capacity of persons are binding upon Spaniards, even though they reside in foreign countries.

Sr. Manresa, without exception the most frequently quoted and authoritative commentator on the Spanish Civil Code, in his commentary upon Article Nine, says:

> *Family duties, rights, status, condition, and capacity of Spaniards in foreign countries.*—They are governed by their national law, in harmony with the provisions of the codes of France, Italy, Vaud, Friburg, and Bolivia. * * * With regard to the *patria potestas*, it is one of its effects to confer upon the parents enjoying it, in the form and under the circumstances

determined by the code, the usufruct of the property of their children. It is also unquestionable that this faculty pertains to the personal statute, and that a Spaniard is entitled to the usufruct of the property of his children, even though it be situated in a country which does not recognize this right. * * *

Family duties, rights, status, condition and capacity of foreigners in Spain.—The Code, which expressly deals with the real and formal statutes with respect to foreigners residing in Spain says nothing regarding their personal statute, except with regard to personal property. In almost all codes which have taken the French code as a model the same omission is to be observed. We believe in this case the personal statute should be applied, for the following reasons: (1) Article 14 of the Civil Code says: "In accordance with the provisions of Article 12 that which is established in Articles 9, 10, and 11 with respect to persons, acts, and property of Spaniards abroad *and of foreigners in Spain* is applicable * * * to Spaniards in provinces or territories of different civil legislation." (2) The legal doctrine of the Supreme Court. This high tribunal in its decision of November 6, 1867, held that the personal statute "must govern all civil acts affecting the person of the foreigner, he being subject to the laws of the country of which he is a subject, by which are to be decided all questions regarding his * * * capacity." * * * In its decision of January 29, 1875, the Court held that "the law of the country to which he belongs is the personal law of the individual, which follows him wherever he may go, governing his personal rights, his capacity to transmit property by will or *ab intestato* * * *;" and in the decision of January 13, 1885, that "It is a doctrine of Private International Law that the foreigner is accompanied by his status and his capacity, and the personal laws of his country should be applied to him."

In his commentary upon Article Nine of the Spanish Civil Code the writer, whose work is published under the pseudonym of Q. Mucius Scaevola, says:

The laws which this article mentions follow Spaniards into every country in which they may be found. As they directly affect their personality they always carry them with them, so to speak, and such laws have, therefore, absolute extraterritoriality. They are *personal* laws—so called, because, as Laurent says, they accompany him and do not leave him so long as he retains the nationality from which they are derived. Thus, for example, one who is a minor in Spain will not be a major in France because majority in that country is acquired at an earlier age than here. The *patria potestas* is acquired and lost by a Spaniard in a foreign country by the facts and causes established by the legislation of our country. * * * The article only speaks of Spaniards—that is to say, of the law which is to govern their capacity beyond Spanish territory, but says nothing regarding foreigners in Spain. This omission is covered, as Sr. Manresa points out, by Article 14, which speaks of the provisions of Articles 8, 10, and 11 with reference to foreigners in Spain, and by decisions of the Supreme Court. But in our opinion, even in the absence of these positive precepts, it would be equally necessary to consider the provisions of Article 9 applicable to foreigners, because of the fundamental principle of the personal statute. The essence of this is that the foreigner's capacity, according to his national law, follows him wherever he may go. Consequently the foreigner in Spain is governed by his national law, and it is so declared by some codes, among them the codes of France, Portugal, Italy and Mexico, which contain provisions similar to that of our Article Nine. * * * The precept of this article, as well as of the two following articles, rests upon the theory of the statutes, real and personal, which is also the basis of the decisions of the Supreme Court. We shall therefore cite several decisions which are, to a certain extent, to be regarded as positive law, as they establish a doctrine in all respects identical with that of the Civil Code, of which they are the antecedents. * * *

Decision of November 6, 1867.

It is a general rule admitted by the nations, with but few exceptions, that the personal statute, in the absence of a specific treaty, must govern all civil acts affecting the person of the foreigner, he being subject to the laws of the country of which he is a subject, by which are to be decided all questions regarding his aptitude, capacity, and personal rights, because otherwise great confusion would result, and it would be easy to elude the national law which protects the rights of subjects, and at the same time imposes upon them correlative obligations.

Decision of January 13, 1873.

It is the doctrine of Private International Law that the foreigner's status and capacity follow him, and that the laws of his country should be applied to avoid inconveniences which would follow were he not to be judged by a single legal standard, when it is not contrary to the interest of the nation in which he makes his demand.

The French authorities take the same view as to the interpretation of Article 3 of the French Civil Code, from which Article 9 of the Spanish Civil Code is copied.

In Baudry-Lacantiniere's enclyclopedic work on the French Civil Law the author says on this subject:

Par. 199. *Law which governs the status and capacity of Frenchmen abroad.*—According to Article Three, third paragraph, which expressly relates to this subject alone, their status and capacity are governed by the French law. It matters little, for the application of that rule, that the Frenchman has merely a residence abroad, which would seem to be the only case to which Article Three applies, or that he has established his domicile there. For often the words "domicile" and "residence" are not used in legislative texts in their technical sense. * * * Thus laws of this category follow the person, as was said by our ancestors, as the shadow follows the body. Inhe-

rent in the Frenchman's nationality, they govern him as long as he preserves that nationality, and he cannot free himself from them, except by divesting himself of it. * * *

Par. 203. *Law which governs the status and capacity of foreigners in France.*—The status and capacity of foreigners, whether resident or domiciled in France, are governed by their national law. This rule is not laid down in Article Three, but it follows, in the first place, from the same considerations which require the constant application to Frenchmen of their own law; hence the silence of the Code in this regard, although it expressly declares that the police laws and the laws relative to real property are applicable to foreigners. * * * Furthermore, if France wishes to have the personal statute of her nationals respected abroad, she must, in fair and just reciprocity, respect in turn the personal statute of foreigners (citations). * * *

Par. 208. Are there any exceptions to the rule just laid down, as regards the foreigner? There is certainly one—the foreigner can never demand in France the application of those of his national laws which are contrary to our principles of international public order. * * * There is another exception which is recognized by a great many writers, but which we cannot accept. * * * According to some the foreigner is not to be governed by his national law when its application, in his relations with Frenchmen, would be prejudicial to the latter. * * * Other writers would not reject the foreign law except in those cases in which the Frenchman who has had dealings with the foreigner, and who would suffer by the recognition of his incapacity, has been led into an excusable error with regard to the foreigner's capacity, and has been guilty of no recklessness on his own part.

Baudry-Lacantiniere, Droit Civile, Volume One (Edition of 1907), pp. 165 *et seq.*

As Article 9 of the Codes of Spain and of the Philippine Islands is copied from Article 3 of the French Civil Code

the French decisions and the opinions of French law writers of authority are entitled to great weight in the construction of the statute under consideration.

Section 9 of the Civil Code now in force in Porto Rico is a reenactment of Section 9 of the Spanish Civil Code. It reads as follows:

> The laws relating to family rights and obligations or to the status, condition and legal capacity of persons shall be binding upon the citizens of Porto Rico although they reside in a foreign country.
>
> Art. 9, Revised Civil Code of Porto Rico, of March 1, 1902.
>
> Revised Statutes and Codes of Porto Rico, p. 597.

In the case of Antongorgi *v.* The Register of Property (6 Porto Rico Reps. 489), involving the interpretation of Art. 9 of the Civil Code of Porto Rico, it appears that one Cuevas, a citizen of the State of New York, but residing in Porto Rico, executed a deed of sale to Antongorgi of a parcel of land in Porto Rico which was acquired by the vendor while married to a former wife. The Registrar refused to record the deed—such officers being vested with quasi-judicial authority under the Spanish Mortgage Law in force in Porto Rico—upon the ground that under the law of Porto Rico real property so acquired became community property of the first marriage of the vendor, and that he could not dispose of it without the acquiescence of the representatives of the estate of his deceased wife. The contention that the law of New York should be followed, under which there is no such institution as the conjugal partnership of the Spanish law, was rejected by the Registrar. Upon appeal to the Supreme Court of Porto Rico this ruling was reversed. The Court, after finding that the evidence that Cuevas was a citizen of New York was sufficient, held that his capacity to execute

the deed must be determined by the law of New York, saying:

> This is all in consonance with the principles of Private International Law, according to which the personal law of the individual is that of the country to which he belongs, which follows him wherever he goes, and regulates his personal rights, his capacity to convey property *inter vivos* and *mortis causa*, and the government of his marriage and family. This principle is admitted by the decisions of the Courts, and especially sanctioned by Article 9 of the Civil Code in force, providing that "The laws relating to family rights and obligations or to the status, condition, and legal capacity of persons shall be binding upon citizens of Porto Rico although they reside in a foreign country;" which principle, by a parity of reasoning, is applicable to the citizens of any state residing temporarily or permanently in this Island.

It is probably true that in those States of the Union in which the common law is in force, this principle of the extra-territorial application of foreign laws governing domestic relations, capacity and status would not be recognized, but in the Philippine Islands, whose statutory laws establish the same doctrine, it would be incongruous and inconsistent were it to be disputed. The Civil Code now in force in the Philippine contains identically the same provisions, under the same numbers, as that embodied in Articles 9 and 14 of the Civil Code in force in Spain in 1903. In Spain the Courts have adopted the theory that capacity is to be determined by the *national* law of the foreigner, not by the law of his domicile or that of the place where the contract or act takes place. The statutory law of Spain—and of the Philippines and Porto Rico—has adopted the same theory, and in cases arising in that territory, therefore, the Courts are not at liberty to choose between the conflicting opinions of writers on Private International Law as to the respective merits of the theories advanced by

them. We may well believe, with the majority of the English and American writers, that the theory of the statutes is one which has outlived the conditions which gave it birth, and would be intolerable were the attempt made to apply it in continental United States, but in the Philippines the legislature has solved the problem by taking it out of the domain of forensic discussion. This is apparent, not only from Articles 9 and 14 of the Philippine Code, but still more strikingly from Article 10, which declares that

> Personal property is subject to the law of the *nation* of the owner; real property to the laws of the country in which it is situated. Nevertheless legal and testamentary successions, both with respect to the order of succession and the extent of rights of succession, and the intrinsic validity of testamentary dispositions shall be governed by the *national* law of the person whose succession is being dealt with, whatever may be the character of the property or the country where it is situated.

Articles 9, 10 and 14 of the Civil Codes of Spain and of the Philippines constitute a statutory recognition in both those countries of that particular doctrine of Private International Law, recognized in many parts of continental Europe and in other Civil Law countries, under which the *national* law of the foreigner is given extraterritorial effect in matters affecting his status, capacity and domestic relations. Spain—and following her, the Philippines and Porto Rico—have carried this doctrine to its extreme consequences, in Article 10 of their Codes, above cited. Both in Spain and in the Philippines the right of testamentary disposition is limited by the system of *legitimes*, under which certain heirs, designed heirs by force of law (*herederos forzosos*), are entitled to a certain proportion of the estate of their ascendants, of which they

cannot be deprived by will, save when the statutory grounds for disinheritance are found to exist.

Civil Code, Arts. 806 *et seq.*

Nevertheless, the foreigner in Spain or in the Philippines is permitted to dispose of his property by will, whether it be realty or personalty, in accordance with his *national* law, regardless of the length of time he may have been *domiciled* in the country of his residence. Of course, in England and in the United States (Wilkins *v.* Ellett, 108 U. S. 356) the rule is that the descent and distribution of personalty is governed by the law of the last *domicile* of the deceased owner, while the descent of realty is governed by the *lex situs* (Kerr *v.* Moon, 9 Wheaton 565) in marked distinction to the Spanish and Philippine doctrine.

The late Charles A. Willard, for many years a distinguished member of the Supreme Court of the Philippine Islands, in his work entitled, Notes to the Spanish Civil Code, available in the Library of Congress, expresses the opinion that Article Nine of the Civil Code continued in force in the Philippines after the change of sovereignty—the word "Spaniards" to be deemed substituted by the word "Filipinos"—and that it has not been affected by the enactment of the Code of Civil Procedure.

Willard, *op. cit.*, p. 6.

The fundamental principle of Private International Law is that the foreign law will be enforced unless it conflicts with some important policy of the law of the forum. In this case there is no conflict whatever between the personal statute of Spanish subjects in the Philippine and the law of the forum—on the contrary, they are identical.

There can, we submit, be no doubt that had the question arisen in Spain, the Spanish courts would have upheld the validity of the emancipation of these Spanish minors

by their Spanish mother, regardless of what the law might be on the subject of emancipation in the country where the act took place. That being so the Philippine courts, administering a law identical in policy with that of Spain, must also recognize the validity of that act when performed in the Philippines. The only limitation upon the contractual capacity of an emancipated Spanish minor is that which requires him to obtain the consent of the emancipating parent if he desires to borrow money or sell or encumber real estate (Civil Code, Art. 217). By public instrument executed by Doña Isabel Palet in Madrid, December 13, 1905 (Exhibit C, Rec. p. 29, Case 25,411) she expressly granted her consent by the execution to her sons of the particular mortgage here in question. The mortgage shows (Exhibit A, Rec. p. 4, Case 25,411) it was executed by these appellants in pursuance of the authority granted them by their mother.

POINT FOUR.

FOREIGNERS CAPABLE OF CONTRACTING BY THE TERMS OF THEIR NATIONAL LAW ARE BOUND BY THEIR CONTRACTS MADE IN THE PHILIPPINE ISLANDS.

(*a*) *The Personal Statute Determines the Capacity to Act.*

In the Philippine Islands this principle is recognized by positive law. Sec. 9 of the Civil Code now in force in the Philippine Islands declares that

> * * * laws relative to the * * * legal capacity of persons are binding upon Spaniards although they reside in a foreign country.

Mr. Justice Willard, in his work on the Spanish Civil Code (*op. cit.*, p. 9), says that since the change of sovereignty the words "Spaniards" and "Spanish" wherever they appear in the Civil Code or the Code of Commerce are to be deemed the equivalent of the word "Filipino" and the Court has so construed them. The Philippine legislature, therefore, having attempted to give its own rules of law regarding the legal capacity of Philippine citizens extraterritorial effect, its courts would presume, in absence of proof to the contrary, that the foreign law on the subject is the same as the law of the forum—that is, in the absence of allegation and proof that the foreign law is otherwise, the law of the forum is applied. But in this particular case the proof (testimony of Dr. Del Pan, Rec. p. 162, Case 25,412) shows without contradiction that the law of Spain in this particular is the same as the law of the Philippine Islands.

In Lar's work on Private International Law (to be found in the Law Library of the Supreme Court), after carefully explaining the difference between juridical capac-

ity and the capacity to act, the author makes the following statement:

> Rules of law which are concerned with the capacity to act have quite a different purpose. It is not their object to withdraw the possession and enjoyment of certain rights from those who are incapacitated. It is their care that such persons shall not involve themselves in loss by their own acts. This care for the person must be a permanent one if it is to have effect; it extends therefore to all persons who permanently belong to the state—*i. e.*, who are domiciled there. It is no doubt conceivable that a system of law should recognize consistently as minors all foreigners who had not attained the particular age fixed by that law as to age of majority, but this could only be carried out if at the same time there were established a guardianship for foreigners who are resident in the country only temporarily. It is, however, plain that this requirement could not be carried out, and, as a matter of fact, no one has ever thought of developing the idea. It necessarily follows that without the necessity of proof of the existence of any customary law, according to the reasonable sense of the statutes on the subject, that one who is capable of acting by the law of his own country must be treated by the courts of all countries as capable.
>
> Bar, Private International Law, p. 305.

The converse of this proposition, namely, that anyone who by the laws of his own domicile is incapable of acting is to be recognized as incapable everywhere cannot on the other hand be shown to follow as a necessary logical inference. On the contrary, the inference from the purpose of those laws as to incapacity to act, as already pointed out, is that foreigners, if they have the capacity to act by the laws of the country where the transaction which may be in question takes place, must be held to have that capacity by the courts of all countries except those of their native country and those of any other where similar law to that recognized in their own country is in force. It may be

> laid down that the legislature will never be inclined to show greater protective care for foreigners than its own subjects, for it proclaims that the latter, on attaining a certain age, no longer stand in need of the care which it exercises over minors but are quite fit to protect their own interests, it would thereby seem to lay down a similar rule for foreigners.
>
> Bar, Private International Law, p. 306.

The author then proceeds to demonstrate that although it does not follow as a logical necessity, because a person is incapable of contracting in accordance with the laws of his own country because of his minority, that he should nevertheless be considered as incapable in all other countries, the countries of Continental Europe, whose legislation is based upon the French civil code, have nevertheless adopted the rule, applicable to such cases, that a person who is incapable in accordance with his personal statute must be regarded as being incapable everywhere, even in countries in which the law applicable to citizens would regard them as being capable under similar circumstances. The author then shows that in view of the serious inconvenience which results from the application of this rule, and especially the damage which under it is often suffered by the nationals of the countries in which this principle has been adopted, it is gradually being abandoned, in some cases by express legislation, and in others by the modification of the doctrine by the courts.

Summing up, after considering the laws of several nations under this subject, he declares that the true rule is that a person who is capable of contracting and obligating himself in accordance with his personal statute can voluntarily bind himself everywhere.

As an explanation of the reason upon which this rule is based the author states that the determination of the age at which the law creates the presumption of the possession

of the necessary mental development for the control by the person of his own affairs is a matter of public policy in each country, as it is unquestionable that the age at which as a general rule the maturity of mind which marks the adult is acquired varies in different nations, and it is to be presumed that each nation can determine better than any other the age which should be fixed as that at which its own citizens are to acquire the status of majors. Unquestionably no foreign nation has any interest in prolonging, with respect to the subjects or citizens of other nations, the time during which the incapacity of minority should continue. Consequently there is nothing inconsistent in the proposition that a foreigner in Spain—for example a British subject— should be bound by a contract entered into by him at the age of 22 years, notwithstanding the fact that Spaniards under their own law do not acquire majority until they have attained the age of 23.

The same reasons which are invoked as being sufficient to justify the recognition of capacity everwhere in favor of a person who has acquired the legal status of a major under the law of his own country with respect to this matter are equally sufficient to justify the recognition of the capacity which under exceptional circumstances is acquired by minors who are emancipated in accordance with the laws of their own country. Bar, in his work on private international law, paragraph 149, speaking of emancipation, says:

> SEC. 149. Minority *Venia Aetatis*. We have already shown why this incapacity to act must, according to the laws of the continent of Europe, be as a rule determined by the personal statute of the party concerned. Logic requires that the personal statute of a minor shall also determine whether and if so what particular acts of disposition *inter vivos* may as an exception be undertaken by minors. It is therefore unnecessary to do more than to notice some specialities with regard to which doubt may arise.

> By systems of territorial law it is in the power of the sovereign or of a judicial officer, or the father, etc. (see Civil Code 476, emancipation) to confer the right of majority either in full or in part. This grant of majority is made in virtue of the laws of that country, although it requires a special act of the authorities of the State and it has therefore the force of law; such a case is to be regarded, therefore, in the same light as if the *lex domicilii* appointed an earlier age as the initial age of majority for all its subjects.
>
> Bar, Private International Law, par. 149.

Almost a century ago the Supreme Court of the State of Louisiana, in a case entitled Saul *v.* His Creditors, 16 Am. Dec. 224, 5 Mart. N. S. L. A. 569, laid down the same rule as that which Bar advocates. In its decision in that case the Supreme Court of Louisiana ruled as follows:

> These principles may be in part illustrated by one or two examples that we presume will receive general assent. The writers on this subject, with scarcely any exception, agree that the laws or statutes which regulate minority and majority, and those which fix the state and condition of man are personal statutes, and follow and govern him in every country. Now, supposing the case of our law fixing the age of majority at twenty-five, and the country in which a man was born and lived previous to his coming here placing it at twenty-one, no objection could be perhaps made to the rule just stated, and it may be, and we believe would be true, that a contract made here at any time between the two periods already mentioned would bind him.
>
> But reverse the facts of this case, and suppose, as is the truth, that our law placed the age of majority as twenty-one; that twenty-five was the period which a man ceased to be a minor in the country where he resided; and that at the age of twenty-four he came into this State, and entered into contracts, would it be permitted that he should in our courts, and to

> the demand of one of our citizens, plead as a protection against his engagements the laws of a foreign country, of which the people of Louisiana had no knowledge; and would we tell them that ignorance of foreign laws, in relation to a contract made here, was to prevent them enforcing it, though the agreement was binding by those of our own State? Most assuredly we would not. Baldwin *v.* Gray, 4 Mart. N. S. 192 (*ante*. 169).

(*b*) *In the Philippine Islands and in Spain the personal statute is the national law of the foreigner.*

Fortunately we have no occasion to discuss the question which has given rise to so much diversity of opinion among writers on the subject of private international law, namely: whether by the personal statute is to be understood the law of the nation of the subject or the law of the country in which he is domiciled. Article 9 of our Civil Code expressly provides that the laws relative to family rights and obligations, and to the status, condition and legal capacity of persons, are binding upon Spaniards (read Filipinos), even though they reside in foreign countries. Article 15 of the Code of Commerce provides that foreigners "who engage in business in Spain (read Philippine Islands) are subject to the laws of their own country with respect to their capacity to contract." It is evident, therefore, that the Philippine legislature has adopted the national law instead of the domiciliary law as that which is to determine the personal statute.

It is true that Article 9 of the Civil Code, although it provides that laws relating to status and capacity are binding upon Spaniards (read Filipinos), although residing in foreign countries, does not declare in so many words that the courts here should reciprocally apply the national law of foreigners for the purpose of determining their status and capacity. Nevertheless, in addition to Article

15 of the Code of Commerce above cited, we can cite decisions of the Supreme Court of Spain which hold that the same rule should be applied reciprocally to foreigners as that which the legislature desired that foreigners should apply with respect to Spaniards.

In its judgment of May 29, 1894, the Supreme Court of Spain declares that

> Foreigners are accompanied by their status and capacity, and the laws of their own country should be applied to them for the purpose of avoiding the inconvenient results which would follow unless they were governed by a single law.
>
> Scaevola, Jur. Cod. Civ., Vol. 1, p. 59.

The same doctrine is laid down in a resolution passed by the General Direction of Registers of Property, dated December 7, 1894, in which it was said:

> Such is the rule recognized by our Civil Code, which provides in its ninth article that the laws relative to the legal capacity of persons, and therefore to the method by which deficiencies in capacity are to be supplied when lacking, are binding upon Spaniards; this same rule of law is logically applicable when we come to judge of the capacity of a foreigner in Spain, inasmuch as the extraterritorial force of our own laws requires, by virtue of the principle of reciprocity, equal force to be given to the laws of other countries.
>
> Scaevola, Jur. Cod. Civ., Vol. 1, p. 60.

This doctrine of the reciprocal application of the principle established by Article 9 of the Civil Code has been recognized by the courts of Porto Rico and of Cuba since the end of the Spanish regime in those Islands.

Article 9 of the Civil Code of Porto Rico, adopted in the year 1902, is exactly the same as the corresponding article of our code, with the exception that instead of the word "Españoles" it contains the word "Puerto Riquenos.'

In the case of Antongorgo *v.* The Register of Property, 6 P. Rico Rep., p. 496 (*ante*, p. 73), it was said that in accordance with the principles of private international law

> the personal law of each individual is that of the country of which he is a subject, and which follows him wherever he goes, regulating his personal rights, his capacity to transmit property by acts *inter vivos* and *mortis causa*, and his matrimonial and family regime; this is a principle established by the decisions of courts, particularly sanctioned by article 9 of the Civil Code now in force, in the provision that "the laws relating to family rights and obligations, or to the status, condition, and legal capacity of persons, shall be binding upon citizens of Porto Rico, though they reside in a foreign country," which precept, by a parity of reasoning, should be applicable to the citizens of any State who may be residents habitually or temporarily of this country.

This same principle of reciprocity has been expressly recognized by the Supreme Court of the Republic of Cuba in a case decided not long ago by the Cuban Supreme Court. In Martinez *v.* Martinez (Cuban Sup. Ct. Rep., Vol. 8, 490), it was held that

> Two fundamental principles of private international law which from remote antiquity have obtained the respect and sanction of cultured nations, and which control for the common benefit the so-called extraterritoriality of all law are expressly recognized in our statutes, and in accordance therewith a citizen who is juridically capable in his own country for the performance of any particular act, or to enter into any particular contract, carries with him everywhere his capacity of origin, although the use or exercise of the right must be adapted to the foreign law in force in the place in which the right is made use of.

Consequently, it is evident that in the Philippine Islands we must recognize reciprocally the same principle which we seek to establish for our own citizens in accord-

ance with Article 9 of the Civil Code, and that, therefore, we must recognize the capacity of the defendant Doña Isabel Palet under her personal statute to confer upon her children, the defendants Joaquin and Zoilo, the status of majority by means of emancipation, and they having been emancipated by their mother in accordance with the personal statute applicable to them, we must give to all contracts entered into by them in those islands, in the exercise of the capacity acquired by them as the result of that emancipation, the same effects which such contracts would receive under their own national law.

(*c*) THE REAL STATUTE DOES NOT AFFECT CONTRACTUAL CAPACITY.

It is of course true that the general principle, as recognized by Article 10 of the Civil Code, is that real property is subject to the local law, but this simply means that the law of the country in which such property is located is to be applied, rather than any foreign law, to determine the existence and extent of the rights of ownership of such property. Consequently no foreigner could insist, merely because of his foreign citizenship, that real property owned by him in the Philippine Islands should be free from the legal easements, for instance, to which such property is subject when belonging to citizens of the country.

In the case of Saul *v.* His Creditors, 16 Am. Dec. 224, 5 Mart. N. S. L. A. 569, above referred to, the Court, speaking of real statutes, says:

> The rules given by Chancellor D'Aguesseau are perhaps preferable to any other. That, says he, "which truly characterizes a real statute, and essentially distinguishes it from a personal one, is not that it should be relative to certain personal circumstances, or certain personal events; otherwise we should be obliged to say that the statutes which relate to the paternal power, the right of wardship, the tenancy by-

courtesy (*droit de viudite*), the prohibition of married persons to confer advantages on each other, are personal statutes, and yet it is clear, in our jurisprudence, that they are considered as real statutes, the execution of which is regulated not by the place of domicile, but by that where the property is situated."

In all matters relating to the disposal of real property the contractual capacity of the owner is to be determined by his national law or by the law of the place where the contract was made, one or the other being applied according to the requirements of the situation with a view to upholding the validity of the contract. The mere fact that the effect of the assumption of an obligation by a person who though *sui generis* by the laws of his own country would be a minor by the laws of our country would indirectly bring about as a result the divesting of his title to real property in our territory in order that the proceeds may be applied to the satisfaction of the indebtedness created by his contract, would not call for an application of the real statute. No question which calls for such application is involved in that case. If the state permits foreigners to own real property within its territory it is interested in insisting that the incidents of such ownership shall be the same for foreigners as for its own citizens, but it is not interested in placing any restrictions upon the power of disposition by acts *inter vivos* of such property by foreigners.

In Wharton on the Conflict of Laws, paragraphs 84 to 93, inclusive, will be found an interesting review of the European authorities regarding the conflicting theories of the laws of nationality and of domicile, as affecting the test of contractual capacity.

In the decision of the Supreme Court of the Philippine Islands this particular feature of the case, while submitted to the Court, was not directly passed upon, the Court

taking the view, which is clearly correct, that the emancipation of the appellants, Joaquin and Zoilo Ibañez de Aldecoa, was valid in accordance with the laws of the Philippine Islands, which appellants insisted should be applied. Mr. Justice Torres, while concurring in the judgment of the Court as regards the validity of the emancipation under the laws in force in the Philippine Islands, also expressed his belief that the same conclusion would be reached by the application to the appellants of their national law, which he deemed the law properly applicable to the case (Rec. p. 171, Case 25,411).

The remarks contained in the decision of the court, disposing of the motion for a rehearing (Rec. p. 174, Case 25,411), show very clearly that the Philippine Supreme Court was in full accord with the views expressed by Mr. Justice Torres and would have adopted them formally had it been necessary to do so. The opinion of the Court upon the Philippine law, accepting the contention of these appellants as to its applicability, lead to the same conclusion regarding the validity of the mortgage as that which results from the application of the national law of the appellants in determining their capacity.

POINT FIVE.

THE MORTGAGE IN DISPUTE HAS BEEN EXPRESSLY RATIFIED BY THE APPELLANT, JOAQUIN IBAÑEZ DE ALDECOA, AFTER HE ATTAINED HIS TWENTY-THIRD YEAR.

The sixteenth paragraph of the findings of the trial judge, in Case 25,412, reads as follows:

> That on the 13th day of June, 1907, at the request of the defendant Aldecoa & Company, and of the defendants Isabel Palet, Joaquin Ibañez de Aldecoa, and Zoilo Ibañez de Aldecoa, and to enable the defendant Aldecoa & Company to obtain an attachment upon the property of one Alejandro S. Macleod in a suit then about to be brought against the said Macleod by Aldecoa & Company for the purpose of recovering of him certain shares of the Pasay Estates Company, Ltd., the plaintiff bank undertook and agreed to provide an attachment bond in the required sum of ₱50,000.00 upon the condition and agreement that the proceeds of the suit against the said Macleod, after deducting the cost of the proceeding, should be applied in their entirety to the discharge *pro tanto* of the liability of Aldecoa & Company to the plaintiff corporation; that the instrument of mortgage of February 23, 1906, was incorporated by reference into the said agreement of June 13, 1907. One of the duplicate originals of the said agreement of June 13, 1907, admitted by defendants to be genuine, is in evidence herein as plaintiff's Exhibit V and is hereby incorporated by reference into these findings. This contract (Exhibit V) was signed by the defendant Joaquin Ibañez de Aldecoa y Palet personally, by Mr. William Urquhart as liquidator of Aldecoa & Company, and by Mr. José Maria Ibañez de Aldecoa as attorney in fact of the defendants Isabel Palet and Zoilo Ibañez de Aldecoa y Palet, under the authority

conferred upon him by the letters of attorney in evidence herein as plaintiff's Exhibit C C C.

Rec. p. 380, Case 25,412.

The trial court in the cancellation case held, upon evidence of the facts above set forth, that the mortgage was binding upon the appellant Joaquin, by ratification, but that the act of his agent was not binding upon the appellant Zoilo as a ratification. The Supreme Court said on this subject in its decision in the cancellation case:

> The conclusions we have arrived at make it unnecessary to consider the ratification of the mortgage contract by the plaintiff Joaquin Ibañez de Aldecoa, after having arrived at the age of majority. However, we might say that we fully agree with the holding of the trial court upon this point.

Rec. p. 171, Case 25,411.

The agreement of June 13, 1907, is in evidence as Exhibit V, Rec. p. 205, Case 25,412; admitted in evidence as Ex. L., p. 112, Case 25,411.

When the agreement was introduced in evidence at the trial of Case 25,411—the cancellation suit—it was stipulated in open court (Rec. p. 112, Case 25,411) that to the original of the agreement there was attached, as part thereof, a printed copy of the mortgage of February 26, 1906, here in dispute.

The Court will observe that by the second paragraph of the agreement of June 13, 1907 (Exhibit V), the appellant Joaquin Ibañez de Aldecoa expressly undertook and agreed to extend the mortgage now in dispute to cover the additional contingent liability of Aldecoa & Company to the Hong Kong Bank arising from the execution of the attachment bond in the action against Macleod. This, we submit, amounts to an express ratification by him of the mortgage in question.

Whitney *v.* Dutch, 14 Massachusetts 457.

Joaquin Ibañez de Aldecoa having been born on March 21, 1885, was over the age of twenty-three years at the time of the execution of the document in evidence as Exhibit V, and competent to contract under his national law and the law of the Philippine Islands.

Civil Code Article 320.
Testimony of Dr. Del Pan, Rec. p. 163, Case 25,412.

The trial judge (Rec. p. 152, Case 25,411) held that the mortgage in dispute had been ratified by Joaquin Ibañez de Aldecoa after the attainment of the age of twenty-three years, and was therefore binding upon him. The Supreme Court of the Philippine Islands, being of the opinion that the contract in question was binding upon both the appellants, regardless of its ratification, did not consider this feature of the case at length, only saying

> The conclusions we have arrived at make it unnecessary to consider the ratification of the mortgage contract by the plaintiff, Joaquin Ibañez de Aldecoa, after having arrived at the age of majority. Nevertheless we might say that we fully agree with the holding of the trial court upon this point.

Rec. p. 171, Case 25,411.

The Court will note that the contract of June 13, 1907 (Ex. V), was also signed by José M. Ibañez de Aldecoa on behalf of the appellant, Zoilo Ibañez de Aldecoa, and that it has been stipulated of record (Rec. p. 155, Case 25,412) that he was at the time of the execution of that document the

> attorney in fact under a general power of attorney of the defendants, Isabel Palet and Zoilo Ibañez de Aldecoa.

The trial judge held that the authority of the attorney in fact did not extend to the ratification of the mortgage, and we are constrained to admit that there is much

strength in that position. It is obvious, however, that, regardless of the effect of the execution of the document in evidence as Exhibit V, the liability of these appellants and the correctness of the judgment of the lower court are firmly established upon other grounds.

POINT SIX.

THE CONSENT OF THE APPELLANTS TO THE EXECUTION OF THE MORTGAGES WAS NOT OBTAINED BY ANY WRONGFUL CONDUCT ON THE PART OF THE BANK.

It was contended in the pleadings on behalf of Joaquin Ibañez de Aldecoa and Zoilo Ibañez de Aldecoa (amended complaint, paragraph 5, Rec. p. 45, Case 25,411) that they were induced to sign the mortgages in question by deceit practiced on them by the manager of Aldecoa & Company and by the manager of the Hong Kong Bank. These contentions were apparently abandoned on the appeal to the Supreme Court of the Philippine Islands, for no mention is made of any such contention in the decision of the Supreme Court in this case. No specific mention of the point is made in the Assignments of Error (Rec. p. 181, Case 25,411). The only attempt made at the trial to substantiate these charges was by the testimony of the appellant, Joaquin Ibañez de Aldecoa, whose deposition (Rec. p. 32, Case 25,411), was introduced in evidence on behalf of plaintiffs at the trial (Rec. p. 53). A careful perusal of that deposition will show that it wholly fails to substantiate the averments of deceit. It simply shows that Mr. Jones, at that time the Agent of the Bank in Manila, plainly informed the appellants, when they came to his office to see him on the subject, that unless the required additional security was given the Bank would proceed immediately to enforce by action its matured demand against Aldecoa & Company.

POINT SEVEN.

THE MORTGAGE WAS SUPPORTED BY A VALID CONSIDERATION.

After the decision was rendered in Case 25,411—the cancellation suit—a motion was made for a rehearing upon the ground, among others, that the mortgage contract was void as to Joaquin and Zoilo Ibañez de Aldecoa by reason of a lack of consideration (Rec. Case 25,411, p. 175). In passing upon this point the Supreme Court said:

> It is asserted that they executed the mortgage under the impression that they were partners in the firm of Aldecoa & Company, when, as decided by a final judgment of the Court of First Instance, they were not such partners. * * * By the same judgment which released the plaintiffs from their obligations as partners of the firm they were declared creditors of that firm. Here was a valid and subsisting consideration for the mortgage; the creditors desire to preserve the firm intact in the hope of recovering from it in due course their total credits. It seems clear that it was the object of the mother and the plaintiff's children to thus save the business, and it matters little that the plaintiffs were creditors and not partners.
>
> Decision Case 25,411, Rec. p. 175.

This ruling has been assigned as error (Eighth Assignment, Rec. p. 182, Case 25,411) but it is respectfully submitted that the ruling of the lower court is correct, on the grounds stated and others equally sound.

(*a*) THE COMMON LAW DOCTRINES AS TO CONSIDERATION DIFFER GREATLY FROM THE CAUSE OF THE CIVIL LAW.

While it is true, as we shall have occasion to show, that had this case originated in a country in which the common

law is in force, the consideration supporting it would have been ample, it is proper to draw the attention of the Court to the fact that the strict technicalities of the English law find no place in the Civil Law.

The difference between the "*cause*" of the Civil Law, and the "consideration" of the English Common Law is pointed out by Judge Howe in his little work entitled, "Studies in the Civil Law," in which he quotes the case of Mouton *v.* Noble, 1 La. 182, in which the Court said, in a case in which it was contended that an agreement to allow a debtor to pay his debt in installments was void as being without consideration:

> To set at naught an engagement of this kind would certainly be a breach of faith; and a rule which puts it thus in the power of a party to trifle with his engagement * * * we cannot recognize as forming part of our jurisprudence. * * * The requirement of a small pecuniary consideration to support an agreement is a mere fiction which the Civil Law has never adopted.
>
> Howe, Studies in the Civil Law, p. 115.

The term *causa* as it is employed in the Spanish Civil Code in force in the Philippines is defined as being, in onerous contracts,

> for each contracting party the undertaking or promise of a thing or service by the other party.
>
> Civil Code, Art. 1274.

The full Spanish text is as follows:

> ART. 1274. En los contratos onerosos se entiende por *causa*, para cada parte contratante, la prestacion ó promesa de una cosa ó servicio por la otra parte; en los remuneratorios el servicio ó beneficio que se remunera, y en los de pura beneficencia la mera liberalidad del brinhechor.

The English translation is,

> ART. 1274. In onerous contracts by consideration (*causa*) is understood, for each contracting party, the undertaking or promise of a thing or service, by the other party; in remuneratory contracts the service or benefit which is remunerated; and in those of pure beneficence the mere liberality of the benefactor.

As Manresa points out in his commentary on this article, in remuneratory contracts the service remunerated may be wholly past. A promise to pay for services rendered without hope or expectation of reward would be enforceable under the Spanish law, although void as resting on a past consideration at common law.

It is likewise evident from the text of the article that a promise to make a gift may give rise to an enforceable contract, supported by the "mere liberality" of the benefactor as its *causa*. The contractual nature of a promised donation is also clearly shown by Arts. 629 *et seq.* of the Civil Code.

As the contract in question is clearly neither "remuneratory" nor of "pure beneficence" it falls within the class which Art. 1274 of the Civil Code designates as "onerous." The promise of these appellants to pay the debt of Aldecoa & Company, under certain conditions, constitutes the *causa* which supported and made enforceable the Bank's promise to forego the immediate enforcement of its demand against Aldecoa & Company, and to allow the debt of that firm to be discharged in installments. Conversely this promise of forbearance by the Bank constitutes the *causa* of the undertaking of the appellants.

But the appellants contend that if they had known that the courts would hold that they were not partners in the firm of Aldecoa & Company, and not liable as such for its debts they would not have assumed the obligation expressed in the mortgage they now seek to repudiate.

This contention rests upon a failure to discriminate between the *motives* which led the appellants to assume the obligation and the *consideration* (*causa*) which makes their promise legally binding. This distinction is recognized and clearly pointed out in Baudry-Lacantiniere's work on the French Civil Law (in the Library of Congress) in which the writer says (Vol. 12, p. 348), dealing with the subject of consideration (*cause*) in the French law:

> We have said that the consideration (*cause*) of the obligation must not be confused with its *motive*. The distinction between the *cause* and the *motive* is delicate, as there is a very close connection and consequently a great similarity between the two things. Each of them is an incentive; but the incentives to human action present a great diversity and the difficulty is to determine which among them all is that which constitutes the *cause* (consideration) and which are those which constitute the motives.

The writer then gives as an illustration the case of a man who, having need of grain with which to seed a field, promises to pay a certain sum of money for seed which another promises to deliver him. The consideration (cause) supporting the promise to pay the money is the promise of the vendor to deliver the seed; its motive is the desire to have the means to plant the field.

Manresa, the eminent Spanish law writer, makes the same observation in his commentary on Article 1274 of the Spanish Civil Code. He says that the *causa* (consideration) is to be distinguished from the motives in that the former is

> the essential reason for the contract, while the latter are the private reasons of one of the contracting parties which in no wise affect the other, and which are not incompatible with some other different true consideration (*causa*). * * * When a thing is purchased it is in itself the consideration (*causa*) for the buyer,

and not the motives which may have influenced him, such as the utility of the thing, its perfection, its relation to some other thing, the use to which he may intend to put it, etc.; a most important distinction, which will prevent the annullment of a contract solely because of its motives, unless the contract has been made subject to the accomplishment of the latter as conditions to the enforceability of the undertaking.

Manresa, Commentaries on the Spanish Civil Code, Vol. 8, p. 642. * * *

It may be added, furthermore, that the motive which induces the formation of the contract is in most instances unknown to the other party. In this particular case the appellants now may say that the motive which induced them to enter into the agreement was the belief that they were liable as partners for the debt. It is equally possible that the motive may have been the desire of the appellants to obtain the benefit of an extension for their mother, who is unquestionably liable, and who has enjoyed the benefit of the delay accorded by the Bank or, as suggested by the lower court, their desire, as creditors, to hold the business together. All of these motives may have existed at the same time, or the incentive to the action may have been something quite different, known only to the appellants. We contend that this is an inquiry with which the law will not concern itself. The *cause* of the obligation assumed by the Bank, and which it has fully performed, was the *promise* or *undertaking* of the appellants, and in no degree the motives which impelled them to assume it.

(*b*) A Benefit to a Third Person is Sufficient to Support a Promise.

But even under the stricter doctrines of the common law which require the consideration to be valuable, this contract would be upheld. It admits of no dispute that

Isabel Palet and Aldecoa & Company as an entity were indebted to the Bank in a large sum and that in consideration of the execution of the disputed mortgage the Bank agreed to forego the immediate enforcement of the right to demand payment, and converted its matured obligation into one payable by installments. Aldecoa & Company and Isabel Palet have fully enjoyed this forbearance on the part of the Bank. It is in itself sufficient to support such a promise as that given by appellants if made by persons having no connection with either the creditor or the debtor. If made by a stranger the motive of the undertaking might be pure generosity, but the obligation would be none the less binding. Were it not so, in nearly every case of suretyship the surety could plead undisclosed motives as a ground for avoiding the contract.

No citation of authorities is necessary to support the proposition that a detriment to the promissor is sufficient, without any corresponding benefit to the promissee, and that an agreement to forbear for a definite time to enforce a valid demand is such a detriment.

(*c*) ALDECOA & COMPANY RECEIVED A SUBSTANTIAL CASH ADVANCE IN CONSIDERATION OF THE EXECUTION OF THE DISPUTED MORTGAGES.

Paragraph Four of the disputed contract (Exhibit A, Rec. p. 10, Case 25,412; Rec. p. 6, Case 25,411) reads as follows:

> That the Hong Kong & Shanghai Banking Corporation shall keep open in favor of the general mercantile partnership Aldecoa & Company, a credit in current account up to the sum of Four Hundred and Seventy-Five Thousand Pesos (₱475,000), Philippine currency, *part of which has already been used.*

On December 31, 1906, when Aldecoa & Company went into liquidation, the total amount of the indebtedness of the firm to the Bank under this contract was, with interest,

₱516,517.98 (Finding, Supreme Court, P. I., Rec. p. 404, Case 25,412) and, without interest, somewhat in excess of ₱475,000.00 (Testimony, Silva, Rec. p. 175, Case 25,412). The evidence shows conclusively that the additional advances were made solely upon the security of the mortgages given by Mrs. Isabel Palet and her sons Joaquin and Zoilo. (Exhibits D7, D8 and D9, Rec. pp. 89 *et seq.*, Case 25,411.)

It is respectfully submitted that from every point of view the consideration upon which the liability of these appellants rests is ample.

POINT EIGHT.

THE PLEA OF ANOTHER SUIT PENDING WAS PROPERLY REJECTED.

The suit brought by Joaquin Ibañez de Aldecoa and Zoilo Ibañez de Aldecoa for the cancellation of their mortgage to the Bank was pending on appeal in the Philippine Supreme Court when the Bank brought its suit for the enforcement of the obligation secured by the mortgage against Aldecoa & Company in liquidation, Doña Isabel Palet, and her sons, Joaquin and Zoilo.

In their answer to the amended complaint (Rec. p. 148) the appellants, Joaquin and Zoilo Ibañez de Aldecoa, set up the pendency of the cancellation suit as a plea in abatement of the present action. This plea was overruled by the trial court, and the ruling assigned as error on the appeal. In disposing of the point adversely to appellants the lower court (Rec. p. 411, Case 25,412) said:

> The basis of the first alleged error is the pendency of an action instituted by the appellants Joaquin and Zoilo in 1908 to have the mortgages which the Bank seeks to foreclose in the present action annulled in so far as their liability thereon is concerned. That action was pending in this Supreme Court on appeal,

when the present action was instituted (1911), tried, and decided in the court below.

The principle upon which a plea of another action pending is sustained is that the latter action is deemed unnecessary and vexatious. (Williams *v.* Gaston, 148 Ala. 214; 42 Sou. 552; 1 Cyc. 21; 1 R. C. L. Sec. 1). A statement of the rule to which the facts of the plea must conform in order to entitle the litigant to its benefits, and which has often met with approval, is found in Watson *v.* Jones (13 Wall. 579; 20 L. Ed. 666).

But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties or at least such as represent the same interest, there must be the same rights asserted and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of it could be pleaded in bar as a former adjudication or the same matter between the same parties.

It will be noted that the cases must be identical in a number of ways. It will be conceded that in so far as the plea is concerned, the parties are the same in the case at bar as they were in the action to have the mortgages annulled. Their position is simply reversed, the defendants there being the plaintiffs here, and *vice versa*. This fact does not arrest the application of the rule. The inquiry must therefore proceed to the other requisites demanded by the rule. Are the same rights asserted? Is the same relief prayed for? The test of identity is thus stated in 1 Cyc. 28:

"A plea of the pendency of a prior suit is not available unless the prior action is of such a character that, had a judgment been rendreed therein on the merits, such a judgment would have been conclusive between the parties and could be pleaded in bar to the second action."

This test has been approved, citing the quotation, in Williams *v.* Gaston (148 Ala. 214; 42 Sou. 552);

Van Vleck *v.* Anderson (136 Iowa 336; 113 N. W. 853); Wetzstein *v.* Mining Co. 28 Mon. 451; 72 Pac. 865). It seems to us that unless the pending action, which the appellants refer to, can be shown to approach the action at bar to this extent, the plea ought to fail.

The former suit is one to annul the mortgages. The present suit is one for the foreclosure of the mortgages. It may be conceded that if the final judgment in the former action is that the mortgages be annulled, such an adjudication will deny the right of the Bank to foreclose the mortgages. But will a decree holding them valid prevent the Bank from foreclosing them? Most certainly not. In such an event the judgment would not be a bar to the prosecution of the present action. The rule is not predicated upon any such contingency. It is applicable, between the same parties, only when the judgment to be rendered in the action first instituted will be such that, regardless of which party is successful, it will amount to *res judicata* against the second action. It has often been held that a pending action upon an insurance policy to recover its value is not a bar to the commencement of an action to have the policy reformed. The effect is quite different after final judgment has been rendered in an action upon the policy. The cases are collected in the note to National Fire Insurance Company *v.* Hughes (12 L. R. A. (n. s.) 907). So it was held in the famous case of Sharon *v.* Hill (26 Fed. 337) that the action brought by Miss Hill for the purpose of establishing the genuineness of a writing purporting to be a declaration of marriage and thereby establishing the relation of husband and wife between the parties could not be pleaded in abatement of Senator Sharon's action seeking to have the writing declared false and forged. The Court said:

"This suit and the action of Sharon *v.* Sharon are not brought on the same claim or demand. The subject matter and the relief sought are not identical. This suit is brought to cancel and annul an alleged false and forged writing, and enjoin the use of it by

the defendant to the prejudice and injury of the plaintiff, while the other is brought to establish the validity of said writing as a declaration of marriage, as well as the marriage itself, and also to procure a dissolution thereof, and for a division of the common property and for alimony."

Incidentally it was held in this case that a judgment of the trial court declaring the writing genuine was not *res judicata* after an appeal had been taken from the judgment of the Supreme Court. So, in the case at bar, the fact that the trial court in the former action holds the mortgages invalid as to one of the herein appellants is not final by reason of the appeal of the Bank from that judgment.

Cases are also numerous in which an action for a separation has been held not to be a bar to an action for divorce or *vice versa*. (Cook *v.* Cook, 4 L. R. A. (n. s.) 83, and cases collected in the note.) In Cook *v.* Cook it was held that a pending action for an absolute divorce was not a bar to the commencement of an action for separation. The above authorities are so analogous in principle to the case at bar that we deem the conclusion irresistible that the pending action to annul the liability of the two appellant children on the mortgages cannot operate as a plea in abatement in the case in hand, which seeks to foreclose these mortgages. The subject matter and the relief asked for are entirely different. The facts do not conform to the rule and it is therefore not applicable.

It is submitted that this reasoning is sound and that the conclusion is supported by authority.

Had the mortgage matured at the time the suit for cancellation was brought the matter might have been tried in one proceeding by making Mrs. Isabel Palet and Aldecoa & Company parties, and filing a cross-complaint against the plaintiffs. But unfortunately the five years fixed as the period which must elapse before suit could be brought on the mortgages had not then expired, and

the Bank was compelled to wait until the mortgage matured before bringing its action.

This case affords a striking example of the evils which would result were such a plea as this tenable. It would always be open to a mortgagor desirous of postponing the day of reckoning to bring a suit for the cancellation of the mortgage a few months before the due day of the obligation, and by successive appeals keep the action pending as a bar to a foreclosure suit for several years. The cancellation suit now under consideration was instituted by Joaquin and Zoilo Ibañez de Aldecoa in January, 1908. They have already succeeded in keeping it in court for nine years, and it will certainly be over ten years before it is finally disposed of. Yet, according to the theory of opposing counsel, we should be compelled to wait that full term of ten years before taking steps to foreclose the mortgage. If we had acquiesced in this theory we should have had to wait until 1918 to file the suit, and if defendants were to follow the same tactics of obstruction might hope for a judgment in 1928. As it is, although the suit was started in March, 1911, they have kept us in court over six years, with the prospect of another year, at least, to be added to it.

Certainly the doctrine invoked was never intended to supply the means by which a debtor might at will evade the payment of a debt—yet this very result would follow if appellant's theory were accepted. The pendency of a suit for the cancellation of an instrument certainly would not stop the running of the statute upon the obligation evidenced by it, and were the obligee to wait for the termination of the cancellation suit before beginning his action he might find it barred. Under the Philippine Code nothing but the institution of an action, partial payment, or a written acknowledgment or promise to pay (Sec. 50, Act 190) will stop the running of the statute.

This is another reason why, as pointed out in the opinion of the court below (*supra*, p. 101) it is only such pending suits as are bound to be *res judicata* of the issues presented by the new suit, *regardless of the success or failure of the plaintiff*, which may be pleaded in abatement. In such cases the plaintiff in the second suit is refused a hearing because he has, or has had, an opportunity in the pending suit to be heard upon every matter which he seeks to litigate in the new action. Unless such an opportunity has been afforded him, the plea will not lie.

> But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or, at least, such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. * * * The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.
>
> Watson *v.* Jones, 13 Wallace 679.

This case was cited and followed in

> United States *v.* "The Haytian Republic," 154 U. S. 116.

The conclusion of the lower court as regards the validity of the mortgage in question with respect to Joaquin and Zoilo Ibañez de Aldecoa is correct, and may be affirmed upon either of the grounds considered, namely:

1. That the emancipation and the contract are binding under the national law of the appellants;

2. That the rules of the Civil Code relating to emancipation have not been affected by the enactment of the Philippine Code of Civil Procedure; or

3. That even if the power of emancipation has been taken away prospectively by the enactment of the Code

of Civil Procedure it did not affect existing relations of parent and child.

With regard to the appellant, Joaquin Ibañez de Aldecoa, it may also be affirmed upon the ground that the mortgage was expressly ratified by him after attaining the age of twenty-three years.

CONCLUSION.

It is therefore respectfully submitted that the judgment of the lower court should be affirmed as regards all the appellants, with interest at the stipulated rate and costs.

F. C. FISHER,
Counsel for the Hong Kong & Shanghai Banking Corporation, Appellee.

Washington, D. C.,
September 15, 1917.

9

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 230.

(25,411.)

ZOILO IBANEZ DE ALDECOA Y PALET AND JOAQUIN IBANEZ DE ALDECOA Y PALET, APPELLANTS,

vs.

THE HONG KONG & SHANGHAI BANKING CORPORATION, APPELLEE,

and

No. 231.

(25,412.)

JOAQUIN IBANEZ DE ALDECOA Y PALET, ZOILO IBANEZ DE ALDECOA Y PALET AND ISABEL PALET Y GABARRO, APPELLANTS,

vs.

THE HONG KONG & SHANGHAI BANKING CORPORATION, APPELLEE.

SUPPLEMENTAL BRIEF FOR APPELLEE.

C. C. TUCKER,
ALEXANDER BRITTON,
EVANS BROWNE,
For the Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 230.

(25,411.)

ZOILO IBANEZ DE ALDECOA Y PALET AND JOAQUIN IBANEZ DE ALDECOA Y PALET, APPELLANTS,

vs.

THE HONG KONG & SHANGHAI BANKING CORPORATION, APPELLEE,

and

No. 231.

(25,412.)

JOAQUIN IBANEZ DE ALDECOA Y PALET, ZOILO IBANEZ DE ALDECOA Y PALET AND ISABEL PALET Y GABARRO, APPELLANTS,

vs.

THE HONG KONG & SHANGHAI BANKING CORPORATION, APPELLEE.

SUPPLEMENTAL BRIEF FOR APPELLEE.

I.

THE CODE OF CIVIL PROCEDURE DID NOT REPEAL EXPRESSLY, OR BY IMPLICATION, THE PROVISIONS OF THE CIVIL CODE RELATING TO THE USUFRUCT OF PARENTS IN THE PROPERTY OF THEIR MINOR CHILDREN AND THE EMANCIPATION OF CHILDREN BY THEIR PARENTS.

The trial court (Lobingier, Judge) (p. 304, Record in No. 231), said:

> "We do not think that it can be successfully contended that the provisions of the Civil Code in which the patria potestas is set forth have been repealed. The patria potestas is one of the most ancient rights recognized by the civil law. Existing long before the Twelve Tables, it is expressly recognized in that famous collection and continued to exist with slight modifications during the entire life of the Roman Law. When that system was imported into Spain the patria potestas came with it and is recognized in the Siete Partidas (IV (18) 1) in all its vigor. As the latter formed the basis of the Philippine common law it is clear that the patria potestas did not depend upon any provision of the Civil Code, having been in force in the Philippine Islands for centuries before that instrument was extended here. To hold that a doctrine of such antiquity and importance, and constituting such an essential feature of the civil law and domestic relations is abrogated by a doubtful provision of the new Code of Civil Procedure, would be revolutionary. Sections 551 and 553 of said code which are pretended to have effected such repeal are not necessarily inconsistent with the patria potestas. They should be harmonized, if possible (U. S. *vs.* Reyes, 10 Phil. 427), and we think they can be. At least the Supreme Court has recognized, the patria potestas as existing since the present Code of Procedure came into force (Mendoza *vs.* Ibañez, 4 Phil., 666); Tuazon *vs.* Orozco, 5 Phil., 61; Reyes *vs.* Alvarez, 8 Phil., 725). If a doctrine so startling as contended for by counsel for defendants is to be announced, it should be by the Supreme Court, and not by this court. Besides, we are disposed to agree with counsel for plaintiffs that the defendants, Joaquin and Zoilo Aldecoa and their mother, being Spanish subjects, were governed in this matter by the law of Spain (Bosque *vs.* U. S., 209 U. S., 96; Martinez *vs.* Castro, 2 P. R. Fed., 523; Rios *vs.* Burset, 2 P. R. Fed., 192, affirmed in 209 U. S., 283).

Section 551 of the Code of Civil Procedure authorizes the court, when it appears necessary or convenient, to appoint guardians for the person and estate, or either of them, of minors, who have no guardian legally appointed by will or deed. Section 553 provides that "the father, or in case of his death or legal disqualification, the mother of the child is to be deemed the natural guardian of the child, and as such is entitled to the custody and care for the education of the minor, but not of his estate, unless so ordered by the court;" and further, that it shall be the duty of the court, in the appointment of the guardian of an estate of a minor, to appoint the father or mother, or near relative of the child, preference being given in the order named.

Section 554 provides that a guardian duly appointed shall have the custody and care of the education of the minor, if the court shall so order, and likewise the care and management of his estate, if the court shall so order, until such minor arrives at the age of majority, or marries, or until the guardian is legally discharged.

Section 555, requiring the guardian to give bond, to make an inventory of the estate of his ward, and to dispose of and manage the estate for the best interests of the ward, requires the guardian to render an account within three months after his appointment, and at the expiration of his trust to settle his accounts, and to pay over that portion of the estate remaining in his hands "to the person lawfully entitled thereto."

There is nothing in the Code of Civil Procedure dealing with the law of parent and child, or of infancy; and there is nothing fixing the age of majority, or determining how and under what circumstances an infant becomes relieved of the disqualifications of minority. Nor is there anything in the Code of Civil Procedure giving or depriving an infant of the right of emancipation, or depriving a parent of the right to emancipate his child.

Nor is there anything in the Code of Civil Procedure on

the question of the parent's legal duty to support and educate his child, or to furnish the child necessaries.

So that recourse must be had to the Civil Code or Spanish law, to ascertain what the law was upon these subjects, after the passage of the Code of Civil Procedure.

By the Civil Code the father, and in his absence the mother, was charged with the express legal duty "of supporting them (their children), to keep them in their company, educate and instruct them in proportion to their means," etc. (Art. 155, Civil Code). In return for this the parent was given a usufruct in the child's property during minority (Art. 160, Civil Code). The Code of Civil Procedure being silent on the parent's legal duty to support the child, it would seem plain that there was no repeal of the Civil Code provision on this subject; so that the parent remains under such legal obligation.

Nor does the Code of Civil Procedure, in terms, divest the parent of the usufruct in his child's property during minority. This usufruct is plainly a property right, and would seem to be expressly saved by paragraph 6 of section 795 of the Code of Civil Procedure, which provides "that nothing in this act contained shall be so construed *as to divest, or injuriously affect, any property right that has already become vested under existing law.*" This saving provision should be considered in connection with the repeal provision of section 795, which limits the repeal to laws "prescribing the *procedure* in civil actions or special proceedings."

Section 553 of the Code of Civil Procedure does provide that the parent shall not be entitled to the *custody* of the child's estate, unless so ordered by the court, but this cannot be construed to divest the parent of his usufruct in his child's property, or in anywise to affect the reciprocal duties and obligations of parent and child. Giving this provision of section 553 full force and effect, it would seem merely to give the court the power to appoint a person, other than the parent, guardian or custodian of the child's estate, without

depriving the parent of his usufruct. After the passage, therefore, of the Civil Procedure, it would appear that the parent was as much entitled to this usufruct as he was before, and it was only right that he should be entitled to it, because he continued to be charged with the legal duty not only of supporting, but of educating, the child.

It is true that section 554 provides that "a guardian, duly appointed, shall have the custody and care for the education of the minor, if the court shall so order," but section 553 expressly provides that the parent is entitled to the same thing. Even if these two sections taken together should be construed as authorizing the court, in its discretion, to take from the parent the right of custody and care for the education of the child, the parent would not, thereby, be relieved of the legal duty of paying for such support and education.

It is respectfully submitted, therefore, that in the absence of express provision or necessary implication, it cannot be said that the sections quoted of the Code of Civil Procedure, which merely take away from the parent the custody of the child's estate in the discretion of the court, were intended to discharge the parent of his existing legal duty to support and educate his child, or to take away from the parent his vested property right, based upon such duty, to a usufruct in the child's property during minority, especially in view of paragraph 6 of section 795, "that nothing in the act contained shall be so construed as to divest, or injuriously, affect any property right that has already become vested under existing law."

Nor did the Code of Civil Procedure destroy the right of a child to parental emancipation after attaining eighteen years of age. This was a valuable and important right, which might also be properly characterized as a property right, on the part of the child, especially in view of the usufruct granted the parent in the child's property. Upon emancipation this usufruct ceased to exist, and the child

came into the free enjoyment of his property, save that under article 317 of the Civil Code the emancipated child could not borrow money or encumber or sell his real property without the consent of his parent.

The only argument advanced in support of the proposition that this right of emancipation was taken away by the Code of Civil Procedure is that such emancipation would deprive a guardian, appointed by the court, of his control over the property of a minor, or, in other words, in the language of the lower court, "the Court proceedings, with reference to the person and property of the minor child would, by the parent's act, be annulled" (pp. 162-163 of Record in No. 230).

But this argument presupposes that in all cases under pre-existing law, minority existed until twenty-three years of age. As already shown, the Code of Civil Procedure nowhere attempts to define minority. It authorizes the court to appoint guardians, but does not say who minors are. To ascertain that recourse must be had to the Civil Code. An examination of the latter shows that adults are persons over the age of twenty-three years, *or persons who, being over the age of eighteen years, have received, with the parents' consent, the grant of majority, or who have married.* See page 51 of the Civil Code, title "Majority", especially article 324, which says: "The provisions of Article 317 (relating to emancipation) shall be applicable to the minor *who has obtained the qualifications of majority.*"

So that, after the passage of the Code of Civil Procedure, the court had no power to appoint a guardian of a person over eighteen years of age, who had been emancipated by his parents; or, if the court, before such emancipation, had appointed a guardian and the minor then received parental emancipation, the guardianship necessarily ended; just as it would end when an infant, who had not been emancipated, attained the age of twenty-three years. In other words, under the Code of Civil Procedure, a person over eighteen

years of age, who had received parental emancipation, could successfully resist the appointment of a guardian under the provisions of that Code; or, if the appointment of a guardian, the ward received parental emancipation, he would have the right to claim the qualifications of majority and a final accounting from his guardian.

II.

THE SAVING PROVISION OF SEC. 581 OF THE CODE OF CIVIL PROCEDURE WITHHELD THE APPLICATION OF THE NEW LAW FROM ALL OF THOSE CASES WHICH WERE ALREADY BEING TAKEN CARE OF UNDER THE PROVISIONS OF THE CIVIL CODE.

> "Sec. 581. Pending guardianships to proceed in accordance with Spanish law, with certain exceptions.—All proceedings in cases of guardianship pending in the Philippine Islands at the time of the passage of this Act, shall proceed in accordance with the existing Spanish procedure under which the guardians were appointed, provided, nevertheless, that any guardian appointed under existing Spanish law may be removed in accordance with the provisions of section 574 of this act, and his successor may be appointed as therein provided, and every successor to a guardian so removed shall, in the administration of the person or estate, or either, as the case may be, of his ward, be governed by the provisions of this act."

It was manifestly the intention of this section that pending guardianships should not be disturbed. Of course, the authors of the new code expressed themselves in terms of American law. In the Snanish law, as disclosed by the Civil Code, guardianship and parental authority were two distinct things. The object of guardianship was defined by Title IX, Art. 199 of the Civil Code to be "the custody of the person and property, or only of the property, of those, who,

not being under the parental authority, are incapable of taking care of themselves. "Parental authority," which was dealt with under a distinct title (Title VII), although not in terms called guardianship, was in fact a guardianship as we understand it. The parent was denominated "legal administrator" of the property of his children (Art. 159, Civil Code). Parental authority included, but went beyond, the common law guardianship by nature, which was the right of the father or mother to the custody of the person of the infant. It added to this right the right to administer the property interests of the child.

Thus, in American law, the generic term "guardianship," includes the Spanish "guardianship" and "parental authority."

From our standpoint, the Spanish father or mother was as much a guardian as one expressly appointed as such. Each was the administrator of the infant's estate. "Non-parental" guardianship was conferred by will, by law and by the family council" (Art. 204, Civil Code), and every guardian was required to give bond (Art. 252) and had to account as such (Chap. 10, Civil Code). "Parental authority," or "parental guardianship", was conferred by the existence of relation of parent and child. But the parent of the child owning property had to account also. If by will property was left a Spanish child for its education, the parent was charged with the administration of such property, if the will named no other person; and the will of the donor was required to be strictly observed. (Art. 162, Civil Code). In that event, an inventory was required to be made of the property with the intervention of the department of public prosecution, and on the recommendation of the department the Judge might decree the deposit in public securities of the property belonging to the child (Art. 163, Civil Code). In all property of an infant, not so limited by will, the parent had a usufruct, or use, during the minority of the child, but even then the parent was charged

"with the obligations of every usufructuary or administrator, and the special obligations established by Sec. 3, title 5, of the mortgage law" (Art. 163, Civil Code). And as such usufructuary, the parent was required, by Art. 491 of the Civil Code, before entering into the enjoyment of the property, "to make * * * an inventory of all the property, having an appraisal of the personal property made, and describing the condition of the real property," although he was relieved of the duty of giving security (Art. 492).

So that, when the Code of Civil Procedure was enacted there were in existence in the Philippines two forms of what the American lawyer and legislator would denominate "guardianship," namely parental guardianship, called in Spanish law "Parental authority," but having practically all of the attributes of guardianship, and guardianship of minors not having parents. Each of these guardians was amenable to the law, and was required by law to administer his ward's estate according to prescribed forms of law and by appropriate proceedings. The non-parental guardian was required to give bond and to state his accounts as guardian. The parental guardian, while not required to give bond, was required, under the particular circumstances named, to file an inventory of his child's property, and, if so ordered, deposit the property in public securities. Under all other circumstances, he, as usufructuary or administrator of his child's estate, was required to file an inventory of the property, making an appraisal of the personal property and describing the condition of the real property.

It would therefore seem to be clear that when the Code of Civil Procedure went into effect every parent was, in the sense of that code, a guardian of his infant child, and as such was charged with the duty under the law of proceeding as such, in a prescribed legal manner designed for the conservation of the child's estate, and such proceeding was under express legal control and supervision. Therefore, when, by section 581, pending guardianships were required

to proceed in accordance with Spanish law, it was the manifest intention not to disturb pending cases of parental administration of children's estates.

III.

The mortgage in dispute was ratified by the appellant, Joaquin, after he attained the age of twenty-three.

Both of the lower courts have so decided.

Nearly a year and a half after the date of the mortgage in dispute, namely on June 13, 1907, Aldecoa & Company, desiring to bring an injunction proceeding against a debtor, entered into an agreement with the appellee, whereby, in consideration of its furnishing the necessary bond, the judgment in such proceeding, if favorable to the firm, should be applied in full towards the indebtedness that the firm owed the appellee; while, if the suit was unsuccessful, any obligation that the appellee might incur should be added to the sum which the firm owed the appellee "and the payment thereof shall be secured by the same mortgages executed, mentioned and described in the instrument which the parties of the first part and the second part executed in its favor on the 23d day of February, 1906, a copy of which is attached to and made part of this document under the terms and conditions of said mortgage" (pp. 205-6 of Record, in No. 231).

The appellant, Joaquin, was a party to this agreement and signed it personally. It will be observed that the effect of the agreement was to practically give a conditional second mortgage upon the property in question.

It has been expressly held that a recital in a mortgage that it is made subject to a prior mortgage by the mortgagor while an infant, is a confirmation of the first mortgage.

Ward *vs.* Anderson, 111 N. C., 115.

"A mortgage executed by an infant on his lands will be ratified by any conduct on his part after attaining majority which manifests an intention to abide by his contract."

16 A. & E. Ency. of Law, p. 306.

Any act by which the infant, after becoming of age, assents to or recognizes as valid his act performed during minority, will be sufficient to confirm the same and preclude him from afterwards disaffirming it.

22 Cyc., p. 540.

Of course the mortgage in question was not a void, but merely a voidable instrument. It passed the title to the property involved, which could be divested only by act of mortgagors. It was in no sense a nullity and could be affirmed by act *in pais*. When the appellant, Joaquin, ratified it, he must be presumed, for he was then of legal age, to have known that he had capacity to do so, and must be presumed to have known what his legal rights in the premises were, for every person is presumed to know the law.

IV.

The following are facts and dates, with their references, which are here printed in order that the court may have ready reference to them:

Appellants were creditors of firm in the sum of ₱155,-127.31 according to the judgment of the trial court (p. 235, in Record No. 231).

The Supreme Court said in response to contention that appellants executed the mortgage under the impression they were partners and that therefore it was without consideration, that

> "By the same judgment which released the plaintiffs from their obligations as partners of the firm, they were declared creditors of that firm. Here was a valid and subsisting consideration for the mortgage; the creditor's desire to preserve the firm intact in the hope of recovering from it in due course their total credits. It seems clear that it was the object of the mother and children to thus save the business and it matters little that the plaintiffs were creditors and not partners" (p. 175, in Record No. 230).

The deed of credit and mortgage dated February 23, 1906, provided that the bank should keep open in favor of the firm "a credit in current account up to the sum of ₱475,000, *part of which has already been used*" (p. 10, in Record No. 231).

On December 31, 1906, when firm went into liquidation, the indebtedness to the bank under the extension of credit was ₱516,517.98 (finding of Sup. Ct. R., p. 404, in No. 231).

Joaquin was born March 27, 1884.

Zoilo was born July 4, 1885.

Both were emancipated July 31, 1903, when Joaquin was 19 years and 4 months old and Zoilo was a little over 18 years old.

The deed of credit and mortgage was executed February 23, 1906, and recites that both were then 21 years of age (p. 4, in Record No. 230, but according to the dates of birth given Joaquin was then 22 years old less one month, and Zoilo was then 20 years and 7 months.

On November 6, 1906, Joaquin and Zoilo applied for land registration of their titles, their petition reciting that the land was subject to the mortgage in question in favor of the bank (p. 307, in Record No. 231). Zoilo was then 21 years and 4 months old. The decree of registration was dated September 8, 1907.

Article 4 of the Code of Commerce provides that persons

who have reached the age of 21 years shall have the legal capacity to engage in commerce (p. 396, in Record No. 231).

Respectfully submitted,

C. C. TUCKER,
ALEXANDER BRITTON,
EVANS BROWNE,
For the Appellee.

Service of copy of the above supplemental brief admitted this — day of March, 1918.

Attorney for Appellants.

(37000)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

(25,411)
No. 230.

ZOILO IBAÑEZ DE ALDECOA Y PALET and JOAQUIN IBAÑEZ DE ALDECOA Y PALET, *Appellants*,
v.
THE HONG KONG AND SHANGHAI BANKING CORPORATION, *Appellee*.

and

(25,412)
No. 231.

JOAQUIN IBAÑEZ DE ALDECOA Y PALET, ZOILO IBAÑEZ DE ALDECOA Y PALET and ISABEL PALET Y GABARRO, *Appellants*,
v.
THE HONG KONG AND SHANGHAI BANKING CORPORATION, *Appellee*.

An Appeal from two Decisions of the Supreme Court of the Philippine Islands.

REPLY OF APPELLANTS TO APPELLEE'S SUPPLEMENTAL BRIEF

ANTONIO M. OPISSO,
Attorney for the Appellants.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

(25,411)
No. 230.

ZOILO IBANEZ DE ALDECOA Y PALET and JOAQUIN IBANEZ DE ALDECOA Y PALET, *Appellants*,

v.

THE HONG KONG AND SHANGHAI BANKING CORPORATION, *Appellee*,

and

(25,412)
No. 231.

JOAQUIN IBANEZ DE ALDECOA Y PALET, ZOILO IBANEZ DE ALDECOA Y PALET and ISABEL PALET Y GABARRO, *Appellants*,

v.

THE HONG KONG AND SHANGHAI BANKING CORPORATION, *Appellee*,

Appeal from the Supreme Court of the Philippine Islands.

REPLY OF APPELLANTS TO APPELLEE'S SUPPLEMENTAL BRIEF

I.

Appellee begins by quoting the conclusion made by the Court of First Instance to the effect that the right of parental authority continues in force

in the Philippine Islands, forgetting the following important facts:

1. That that finding was made by the Court of First Instance in Case No. 231, where the main issue was whether or not the action of foreclosure should be abated on account of the pendency of Case No. 230 where the issue was as to whether or not the right of parental authority still existed after the promulgation of the Code of Civil Procedure. (See Rec. 231, pp. 146-149.)

2. That the same Court of First instance in Case No. 230 where the issue was whether or not the right of parental authority still existed after the promulgation of the Code of Civil Procedure, said: (Rec. 230, pp. 141, 151.)

> "Did the mother of the plaintiffs have power at law to emancipate her children, the plaintiffs, so that they could freely dispose of or mortgage their real property, having her consent so to do?
>
> Under the laws in force in the Philippine Islands at the time the documents of emancipation, hereinbefore referred to, were executed, the father, or in case of his death or disqualification, the mother of a minor child, is the natural guardian of the child and is entitled to its custody, but not of its estate, unless it is so ordered by the Court. (See section 553 of Act 190.)
>
> Clearly, then, the mother, being the natural guardian of the plaintiffs, but not having the legal custody of their estate, for it nowhere appears that the Court has ordered their estate

into her custody, or in any way subrogated it to her control might emancipate the plaintiffs from her personal custody, but could not authorize them while minors to dispose of or mortgage their real estate, without the sanction of the Court.

3. That the finding of the Court of First Instance in Case No. 230, has been sustained by the Supreme Court of the Philippine Islands, (Rec. 230, pp. 159 to 165,) thereby reversing the findings made *obiter* by said Court of First Instance in Case No. 231.

4. That appellee, not having appealed from any of the decisions rendered by the Supreme Court cannot assign any cross-error or argue against the findings of the Supreme Court, which are binding upon said appellee. Landram *v.* Jordan, 203, U. S. 56, Southern Pine Co. *v.* Ward, 208, U. S. 126, Guarantee Co. *v.* Phoenix Ins. Co., 126 Fed. 170.

It is therefore submitted that all the argumentation made by Counsel for appellee at pp. 2-7 of his supplemental brief are irrelevant, inasmuch as they tend to attack the findings of a decision from which he has not appealed and which has been rendered in a suit in which appellee was a party, said finding being the finding on an issue directly submitted by the appellee to the decision of the lower Court:

This insistence of the appellee in attacking, rightly or not, the first part of the decision of the Supreme Court of the Philippine Islands, (Rec. 230, pp. 159 to 165,) seems an admission of our contention that with such finding the second

part of the decision of the Supreme Court of the Philippines cannot logically stand, and is wholly untenable.

The undersigned begs to submit to this Hon. Court what he stated in his oral argument as to the fact that the finding made in last part of the decision of Case No. 230 is irreconcilable with the findings of the first part, where the Court says, (Rec. 230, p. 160,) that with the establishment of the new law of guardianship, "the Philippine Commission inserted no exception saving the institution of patria potestad from its operation"; that when it was enacted "no attempt was made to exclude the patria potestad from the operation of the law of guardianship" (p. 160) and that this law "extended to, and included minor children whose parents were still living" (*Id.*)

Counsel for appellee insists on attacking these findings of the Supreme Court because with them he knows that the last finding (against which we have appealed) cannot be sustained, because when it says that the provision of the new law "extend to children whose parents are still living" and those parents were exercising the right of parental authority, it cannot consistently say that the mother or these appellants was excluded from the operation of this law because she was exercising the right of parental authority before the promulgation of the Code of Civil Procedure.

The reason given by the Counsel for appellee in his argument that the right of parental authority as to the property of the minor children still exists is that Art 155 of the Civil Code provides that it is the duty of the parent to maintain and support

its minor child. We beg to submit that this Article is not in force at the present time and has not been in force since the promulgation of the Code of Civil Procedure.

Judge Charles A. Willard of the Supreme Court of the Philippine Islands, in his "Notes to the Civil Code" written a few years after the Code of Civil Procedure went into effect, says at page 29, commenting on Art. 155:

> Art. 155.—The parents are not bound to support the child when he has property of his own sufficient for the purpose. (See Art. 160.)

And commenting upon Art. 160 (p. 29,) he says:

> The new Code of Civil Procedure says that the father "is not the guardian of his estate unless so ordered by the Court." (Sec. 553.) By this provision Art. 159 of the Civil Code which gave the father as such the administration of his minor son's property has been repealed. * * * If the father is not appointed guardian but a third person is, who is entitled to the income of the ward's property? That the guardian is entitled to possession, is clear, not only from Art. 553, but also from Art. 565 which says that "every guardian must manage the estate of his ward frugally and without waste." This in itself is inconsistent with the idea of any right of usufruct in the father, for where tangible property is concerned, the *usufructuario* is entitled to possession.
>
> But passing this point, is the father entitled

to receive the income from the guardian? There is no express provision to this effect in the new Code. On the contrary, there are provisions which indicate that he is not entitled to it. Section 563 says that "the guardian must pay all just debts due from his ward out of his personal estate and the income of his real estate if sufficient." Section 565 says "that the guardian '*must apply the income and the profits thereof*' for the comfortable and suitable maintenance of the ward and his family." Section 569 says that "when the income of an estate under guardianship is insufficient * * * to maintain and educate the ward" the real estate may be sold. These sections show plainly that the income is not to be paid to the father but that it is to be used in paying the debts of the ward and in providing for its maintenance. Another result follows from those sections, namely, *the repeal of Arts.* 155 *and* 143 *of the Civil Code so far as they require a father to support his minor children when the latter have sufficient property for that purpose.* The father having been relieved of that duty the legislator evidently intended to take from him the corresponding rights to the income.

It may be added that the provisions in Section 571 of the Code of Civil Procedure directing the investment of the surplus money which may be in the hands of the guardian, is inconsistent with the idea that such surplus is to be paid to the father.

It is clear then, as the Counsel for appellee admits, that, if the usufruct on the minor child's property was given to the father in return for his *duty* to maintain and support him, as soon as that duty ceases, there is no reason for the usufruct to exist.

And now as to the argument that the parent could not be divested of his right of usufruct and administration of the child's property under the provision of paragraph 6 of Sec. 795 of the Code of Civil Procedure, which he quotes. Aside from the fact that the reason for the existence of that right has ceased, as we have just seen, usufruct is not a vested right of property. The definition of the word *usufruct,* as given by Escriche and in Black's Law Dictionary, is as follows:

> USUFRUCT—in the Civil Law. The right of enjoying a thing, the *property of which is vested in another,* and to draw from the same all profits, utility and advantage which it may produce, provided it be without altering the substance of the thing. (Civ. Code. La. Art. 533. See Mulford *v.* La Franc, 26 Cal. 102; Cartwright *v.* Cartwright, 18 Tex. 628; Strausse *v.* Sheriff, 43 La Ann. 501.)

Besides, the Code of Civil Procedure came precisely to give to the minor the enjoyment of a right of which he had been deprived, to wit: the right to the profits and income of his own property. As well said by the Supreme Court of the Philippine Islands, the institution of the right of parental authority was repugnant to the American ideas of law and administration of justice and the

Philippine Commission determined to "ruthlessly brush aside the Spanish law and inaugurate the new in the form which had withstood the test of time in the United States." (Rec. 230, p. 168.)

Now we will go a step farther. We will grant, for the purposes of the argument, that the usufruct of the parent over the child's property was a vested right of property, and that under No. 6 of Section 795 of the Code of Civil Proceduce the provisions of a said Code could not divest the mother of these appellants of her rights of parental authority over the property of her minor children, that is, of the right to use and enjoy the profits of the income of said property. But this does not mean that the provisions of the Code of Civil Procedure would give her the right to say when her children could have power to administer and manage their own property. She might have the right to renounce the right of parental authority according to Art. 167 of the Civil Code which provides that "parental authority terminates: (1) by death of the parents or of the child; (2) by emancipation; (3) by the adoption of the child." By making a deed of emancipation she renounced to that right, but since this act was executed after Chapter 27 of the Code of Civil Procedure went into effect, whereby the Courts are entrusted with or are given the exclusive power to appoint guardians for minors, she could not deprive the Court of that power by giving to her minor children the right to manage their own estate before they became of age.

If parental authority terminates according to the article of the Civil Code just quoted, by eman-

cipation, then we have that the relation following the Act of emancipation between the parent and the child is an entirely new relation, and inasmuch as in the present case it sprang after the provision of the Code of Civil Procedure went into effect, it must, therefore, conform strictly to the mode of procedure provided for in said Code and could in no way be governed by any other provision of the Civil Code. This being so, we are confronted now by the provision of Article 317 of the Civil Code which reads as follows:

> Art. 317.—Emancipation qualifies the minor to control his person and property, as if of age; but, until he attains his majority, the person emancipated can not borrow money nor encumber or sell real property without the consent of his or her father, and in the absence of the latter, that of the mother, and, in the absence of both, without that of a guardian. Neither can he nor she appear in court without the attendance of said persons.

And by the provisions of the Code of Civil Procedure and especially under the provisions 553 and 569 of said Code, this consent could no longer be given by the parent unless said parent should first obtain from the Court his appointment as guardian of the minor's estate inasmuch as after the promulgation of the Code of Civil Procedure, only the Courts have power to authorize the sale or encumbrance of the estate of minors.

We notice that our proposition as contained in point 6 of our main brief has not been referred to by Counsel for appellee and we beg to submit

again said point to the consideration of this Hon. Court, the discussion of which will be found at pages 85 to 95 of our main brief.

II.

In answer to the second proposition found in Appellee's supplemental brief we might simply refer to and resubmit POINT TWO of our main brief which will be found at pages 53 and 64 of the same.

But in addition to this we beg to call the attention of the Court to the fact that the argument made in Appellee's supplemental brief is based on wrong impression, and on a bad interpretation of the Section of the Civil Code which he quotes therein. To begin with, there is no procedure provided for in the case of parental authority in the Civil Code, because the Civil Code was not a Code of Procedure. There was a Code of Procedure existing and in force in the Philippine Islands prior to the time of the promulgation of the present Code of Civil Procedure. That Code was repealed by the new Code, and on being repealed the Legislators, in order to avoid confusion, introduced Sections 581 and 795, saving those proceedings then *pending* in civil actions or special proceedings from the operation of the new Code, in so far as the provisions of the latter could not be conveniently applied to such actions or proceedings. But, as we have already submitted, in the case of the administration by the parent of the property of his minor children, there was no proceeding and there was no procedure to follow. There is not a single article either in the Civil Code or in the Code of

Civil Procedure * that has the least resemblance or allusion to any proceeding or procedure in the case of parental authority. As said by the Supreme Court in its decision, (page 159, Record 230,) after quoting the articles of the Civil Code relating to parental authority over the property of minor children, in those articles "nothing is said of a bonded guardian appointed by the Court and required to account to the Court for the property and income of the child's estate." Article 63 of the Code of Civil Procedure giving the jurisdiction of the Courts contains no provision in regard to proceedings or anything that might resemble them in the case of parental authority. *

Counsel for appellee in an effort to show that there was some sort of proceeding in the case of parental authority, cites Art. 163 and Art. 481 of the Civil Code. We are reluctant to believe that Counsel for appellee really wants to convey to this Court the idea that these articles provide for any proceeding or procedure before any Cour in a case like the present one.

The right of parental authority according to Sections 159 to 166 of the Civil Code could be exercised in two different ways. The parent had the *usufruct* and therefore the administration on the property belonging to the child by its work or industry, or, as the Spanish text says, by lucrative title, that is to say, by inheritance; but if the property or the income of property was donated or left to a child by will to cover the cost of his or her education, then the father had no usufruct on said property, but had *only the administration and* ONLY IN THAT CASE, that is to say, *in the case where*

* We refer to the old Code of Civil Procedure.

the parent had only the administration, (See Art. 163 of the Civil Code,) the parent had to make an inventory and on the recommendation of the Department of Public Prosecution, the Judge might decree the deposit in public securities of the property belonging to the child.

In the other case, however, when the parent had the usufruct together with the administration, the intervention of the public prosecutor *was not necessary* and *there was no proceeding* before the Court. It is true that the father as the usufructuary might make an inventory, but this inventory was not made judicially and he was not really bound to even make one because, according to Art. 493, the usufructuary, whatever the title for his usufruct might be, might be excused from making an inventory when no one would be injured thereby; and the only judge as to whether or not he was excused from doing so, was the parent himself, because there is no provision contained in the Code as to who could compel him to make such inventory. At any rate the inventory was not part of any judicial proceedings and if made, could be made simply by private instrument or by notarial document.

Before we close the discussion of this point, we beg to call the attention of this Honorable Court to a misstatement made in the supplemental brief of the appellee: At page 9 thereof, counsel for appellee states that the law required the usufructuary *to file* an inventory. The Civil Code does not use the word *file,* but the word MAKE, and the Code does not say or contains any provision as to where this inventory was to be filed, which means in other words, that said inventory, as we have already said

before, needed only to be made in a private instrument or by notarial deed, and not judicially. The only time when the parent had to apply to Court, on a mere petition, was in cases when the property of the minor child was to be sold or encumbered, in which case, it is clear an undeniable that after the passage of the Code of Civil Procedure, no parent could have applied to Court for such authority to sell on the strength of his right of parental authority, but he would have first to be appointed guardian of his minor child and as such guardian, ask for permission of the Court to sell or encumber the child's property.

We respectfully submit then, that Section 581 in no way applies to cases of parental authority over the property of their minor children.

III.

The third proposition advanced by the Appellee in his supplemental brief is that the appellant, Joaquin Ibanez de Aldecoa has ratified the contract of Feb. 23, 1906. In answer, we beg to renew here our argument on pages 114 and 116 of our main brief. The mortgage contract not containing the requisites of Art. 1261 of the Civil Code cannot be confirmed. (Art. 1310 of the Civil Code.) Article 1311 of the same Code provides:

> "The confirmation can be made either expressly or in an implied manner. It shall be understood that there is an implied confirmation when, *being aware of the cause of the*

nullity, and such cause having ceased to exist, the person who may have a right to invoke it should execute an act which *necessarily implies his wish* to renounce such a right.

In the contract of June 13, 1907, there is no express confirmation. There was no implied confirmation because Appellant Joaquin Ibanez the Aldecoa *was not aware of the nullity,* because the nullity had not ceased to exist and he did not execute any act which necessarily implied his wish to renounce the nullity. If there was any confirmation, it was done under a mistake of fact. All the conditions constituting the error which vitiated the contract of Feb. 23, 1906, still existed at the time the contract of June 13, 1907, was executed.

IV.

In regard to the first fact mentioned in chapter IV of appellee's supplemental brief wherein he makes reference to the decision of the lower Court in overruling the motion for a new trial, in answer to these appellants' contention that there was no consideration for the contract, we beg to refer this Honorable Court to pages 100 to 102 of our main brief where we call the attention of this Court to this part of the decision of the lower Court which we have assigned as error.

In answer to the statement that at the time the firm of Aldecoa and Company went into liquidation the outstanding debt of Aldecoa and Company to the Bank amounted to P. 516,517.98, we beg to

submit that this fact, far from being beneficial to the appellee, favors the contention of these appellants and that of the other appellant Isabel Palet, inasmuch as by extending the amount of the credit which the contract of February 23 was supposed to secure this contract became novated, and thus, the liability of these appellants and of the other appellant Isabel Palet immediately ceased, because said extension of credit changed the conditions of the contract.

Counsel for appellee makes a passing reference to the fact that these appellants in their application for registration of their property in the Philippines acknowledged the existence of the mortgage on said property, meaning perhaps to imply thereby that this was also a ratification of said contract of mortgage. We beg to point out that no such ratification can be derived from such an act because in the first place, said application was not signed by them, and in the second place, because even if they had signed it that application was made when they were still minors.

The citation of Art. 4 of the Code of Commerce we cannot see what bearing can have in the present case, when even if these appellants were able to engage in trade they could not either mortgage or sell their property without the consent of the Court, and before the Code of Civil Procedure went into effect, without the consent of the parent.

V.

In concluding, we beg to call the attention of

this Court, that the other points raised by the Appellants in their main brief still remain unanswered and no argument has been aduced to offset ours. We have confined ourselves to answer the Appellee's supplemental brief. This does not mean to say, and we do not desire it to be interpreted as relinquishing the other points mentioned and raised in our main brief which we incorporate hereto, and we submit to the consideration of this Hon. Court both as to the appeal of Joaquin and Zoilo Ibanez de Aldecoa, and as to the appeal of Isabel Palet y Gabarro.

Respectfully submitted.

ANTONIO M. OPISSO.
Attorney for the Appellants.